

QUARTERLY REPORT of the ATTORNEY GENERAL of ALABAMA

For the Period:
From April 1, 1937
Through June 30, 1937
VOL. VII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from April 1, 1937 through June 30, 1937.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

The Office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
A. A. CARMICHAEL,
Attorney General.

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OPINIONS

April 1, 1937

Hon. John D. McNeel,
Administrator, Alabama
Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. County governing bodies in the "wet" counties of the State of Alabama have the right, by resolution, to levy a license on clubs, hotels and restaurants located therein for the privilege of selling liquors in accordance with the provisions of the Alabama Beverage Control Act in an amount to be set by said body not to exceed the amount of the State application or permit fee for the same privilege, which by Sub-section (b) of Section 11 of the Act is \$25.00 in towns of not less than four thousand five hundred population to not more than twenty-five thousand population and is \$100.00 in towns of twenty-five thousand population or more.

2. County governing bodies of the "wet" counties of the State have the right, by resolution, to levy a license on retail dispensers of malt or brewed beverages in such an amount as the governing body may determine, provided, of course, that the amount is reasonable, and provided, further, that if a retail dispenser operates more than one such place of business for the sale of malt or brewed beverages, then each additional license issued to him after the first license is graduated upon a basis of 33 1/3% above the cost of the last preceding license, as is provided by Sub-paragraph one of Sub-section (c) of Section 21 of the Act, supra.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 17, 1937, in which you request my opinion on the following question:

Question 1. Do the County governing bodies of the "wet" counties of Alabama have the right, by resolution, to levy a license on clubs, hotels and restaurants for the privilege of dispensing liquors in accordance with the provisions of the Alabama Beverage Control Act?

Question 2. Do the County governing bodies of the "wet" counties of the State of Alabama have the right, by resolution, to levy a license on retail dispensers of malt or brewed beverages?

We find the following provisions in the Alabama Beverage Control Act in regard to the right or authority of a County to levy a license on clubs, hotels or restaurants for the privilege of selling liquors in accordance with the provisions of said Act:

In Sub-section (b) of Section 11, which is the section dealing with applications for hotel, restaurant or club liquor licenses, we find the proviso that such applicants, shall, at the time of making their application to the Alabama Alcoholic Beverage Control Board for license, accompany said application "with the amount or amounts of the prescribed license fee, or fees, if any, levied by the County in which it proposes to do business".

Section 12 of said Act reads as follows:

"Every applicant for a club license, a hotel liquor license, or restaurant liquor license, shall before receiving such license pay to the Board the license fee or fees, if any, levied by the county in which the place of business of such applicant is located.

"All license fees collected under this Section shall be collected by the Board for the use of the county in which such licenses were levied and in which the applicant's place of business is located, and shall be paid over to said county at quarterly intervals.

"Any county or municipality may fix a reasonable privilege or license tax on any such club, hotel or restaurant located therein, conditioned on a permit or liquor license being issued by the Board. Provided, however, no county shall levy a license as hereinabove described in an amount greater than the State permit fee herein levied for like privilege.

"No county or municipality shall have any authority to levy a license or tax on any State Liquor Store."

Sub-section (3) of Section 14 of said Act, which is the section dealing with the renewal of licenses, reads as follows:

"Licenses issued under the provisions of this Act shall be renewed annually upon the filing of applications, in such form as the Board shall prescribe, but no license shall be renewed until the applicant shall pay to the Board the requisite application fee and license fees of counties as herein above described."

In regard to the right of counties to levy a license on retail dispensers of malt or brewed beverages, we find the following provisions:

Sub-section (3) of Section 22, which is the section dealing with license fees and the distribution of revenues, reads as follows:

"In the case of a retail dispenser, such license fee as may be levied by the county in which his place of business is located, and shall be paid to the Board,"

and Sub-section (7) of the same section contains the following proviso:

"License fees paid for retail dispenser licenses shall be paid by the Board to the counties in which the licensed places are located, and in which such licenses are levied."

Sub-paragraph (1) of Sub-section (c) of Section 21 of said Act provides a graduated scale for licenses for retail dispensers of malt or brewed beverages where one retail dispenser operates more than one such place for the sale of malt or brewed beverages.

In view of the plain, clear and unambiguous language the above quoted provisions of the Act, it is my opinion that your questions must be answered in the following manner:

1. County governing bodies in the "wet" counties of the State of Alabama have the right, by resolution, to levy a license on clubs, hotels and restaurants located therein for the privilege of selling liquors in accordance with the provisions of the Alabama Beverage Control Act in an amount to be set by said body not to exceed the amount of the State application or permit fee for the same privilege, which, by Sub-section (b) of Section 11 of the Act is \$25.00 in towns of not less than four thousand five hundred population

to not more than twenty-five thousand population and is \$100.00 in towns of twenty-five thousand population or more.

2. County governing bodies of the "wet" counties of the State have the right, by resolution, to levy a license on retail dispensers of malt or brewed beverages in such an amount as the governing body may determine, provided, of course, that the amount is reasonable, and provided, further, that if a retail dispenser operates more than one such place of business for the sale of malt or brewed beverages, then each additional license issued to him after the first license is graduated upon a basis of 33 1/3% above the cost of the last preceding license, as is provided by Sub-paragraph (1) of Sub-section (c) of Section 21 of the Act, supra.

You further ask in your request for opinion if it was within the competency of the Legislature of Alabama to so authorize counties to levy the license or licenses hereinabove described and discussed. It is my opinion that this question must likewise be answered in the affirmative. The general rule in this regard it stated in 37 C. J. 175, as follows:

"Except in so far as it is either expressly or impliedly prohibited or limited by the State Constitution, the Legislature may delegate the power of requiring licenses and imposing taxes on occupations and privileges within their respective limits, to municipal corporations, **counties**, villages or towns, and to other political sub-divisions or agencies of the State.

"The power of requiring licenses and imposing license and occupation taxes may be delegated by the Legislature to political sub-divisions or agencies of the State, such as to **counties**, villages or towns, and other municipal or quasi municipal corporations," (Emphasis ours).

This rule obtains in Alabama and we find the case of *Hill v. Moody*, 207 Ala. 325, which deals with this general subject, cited in *Corpus Juris* in support of the rule laid down by it in the above quoted provisions, in so far as the same applies to counties.

The case of *Hill v. Moody*, supra, adopts the rule laid down in the earlier case of *Mills v. Court of Commissioners of Conecuh County*, 204 Ala. 40, where the Court spoke as follows:

"Cities, incorporated towns, and **counties** have such power of taxation, as is delegated to them by legislative authority (*Phoenix Cooper Co. v. State*, 118 Ala. 143, 22 So. 627, 72 A. S. R. 143); and the legislative power to relegate the subject of taxation is unlimited; except so far as that department may be restrained by the State or Federal Constitutions (*Home v. Kennerly*, 83 Ala. 608, 3 So. 683; *Capital City Water Co. v. Board of Revenue*, 117 Ala. 303, 23 So. 970)." (Emphasis ours).

Therefore, it seems very clear that it was within the legislative competency to authorize the county governing bodies of the various "wet" counties of this State to levy licenses in the manner set out in the Act, and hereinabove considered and discussed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Hon J. F. Laseter,
Judge of Probate,
Clayton, Alabama.

Act No. 179, 1936 General Acts, page 215, does not relieve Probate Judge of duty to keep record of marriage as imposed by Sections 9000-9001, Code of Alabama, 1923.

Section 9581, subdivision 7, Code of Alabama, 1923, imposes upon Probate Judge the duty to give certified copy of record kept by him pursuant to Sections 9000-9001, but he is under no duty to give certified copy of original papers not required to be kept on file in his office.

Probate Judge is not required to account to the State Treasurer for fees collected in payment of certified copy of record required to be kept under Sections 9000-9001, Code of Alabama, 1923.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter in which you submit the following inquiry:

"I desire and request your opinion on the question:—

"Whether since the enactment of Act No. 179 Extra Session 1936 Acts, page 215, Probate Judges are still required to keep records of marriage under Section 9000 and 9001 of the Code of 1923?

"You will observe that the Act of 1936 above cited provides that Probate Judges shall send the original license papers to the State Board of Health, and that the said Board is authorized to issue certified copies of any such marriage licenses and marriage certificates on file, upon request, to any applicant entitled to the same upon payment of the prescribed fee, and that said Board shall keep and preserve records of marriages obtained by it under this enactment.

"Under subdivision 7 of Section 9581 of the Code, Probate Judges are authorized to give transcripts of any paper or record required to be kept in his office. I am occasionally called on for certified copies of marriages where the license was issued and the marriage occurred in this county. Does the law still require me to keep marriage record books and authorize me to furnish certified copies therefrom, or is the effect of the said Act of 1936 to give the State Health Board exclusive authority to furnish certified copies of marriage licenses and certificates? I refer, of course, to licenses issued since said Act took effect.

"Further, if I am authorized still to issue certified copies of marriages do I have to account to the State Treasurer for the fees collected for such service?"

As I read your letter, you desire an answer to questions as follows:

(a) Does Act No. 179, General Acts of 1936, page 215 (amending Section 1153, Code of Alabama, 1923) relieve you of the duty of keeping marriage record which you keep pursuant to Sections 9000-9001, *supra*. Section 9581,

(b) Does Act No. 179, supra, relieve you of the duty of furnishing certified copy of marriage record and vest that authority exclusively in the State Board of Health?

(c) If you are authorized to furnish certified copies of marriages, do you have to account to the State Treasurer for the fees collected for such service.

With reference to question (a), it is my opinion that Act 179, supra, does not relieve you of such duty. The effect of the Act so far as this question is concerned is to leave undisturbed the requirements imposed by said Sections 9000-9001 which require you to keep certain records in the manner and form set forth in said sections.

With reference to question (b), it is my opinion that you are required to furnish, upon payment of lawful charges therefor, a certified copy of the record which you keep pursuant to Sections 9000-9001, supra. Section 9581, sub-section 7, reads as follows:

"On application of any person, and on payment and tender of the lawful fees, to give transcripts of any paper or record required to be kept in his office, properly certified."

You are required to keep certain records in obedience to the mandates of said Sections 9000-9001, but you are not required to keep the original marriage licenses and certificates. Act 179, supra, requires you to forward the originals to the State Board of Health, Montgomery, Alabama. Since you do not have the originals in your custody and possession, you are not required to give a certified copy of them, but only of your records.

Answering question (c), I can find no law requiring you, if you are not on a salary, to remit to the State Treasurer of Alabama any fee which you collect for a certified copy of the marriage records in your office. If you are on a salary, all of the fees earned by you go to the County Treasury, and the fees earned by you for issuing a copy of your record should also go to the County Treasury, credited to the County fund from which you draw your salary. However, Judges of Probate should account for all fees collected by them in their official capacity in order to determine whether or not their maximum net compensation exceeds \$6000.00 per annum (See Sec. 370-A of Revenue Act of 1935).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Mr. H. I. Erwin, Clerk,
Probate Court, Jackson County,
Scottsboro, Alabama.

Counties—Local Acts of 1931—Acts No. 319, page 155—Warrant issued pursuant to the aforementioned Act is valid and may be refunded under the Financial Control Act of 1935 (page 803) or paid if funds are available for such payment.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter in which you submit an inquiry as follows:

"Will you render me an opinion on the following:

"There was presented to me today warrant No. 29 of the County of Jackson for \$2661.91 with coupon \$425.90 to the Nashville Bridge Company, for payment. This warrant is described in full in Local Acts, 1931, page 155. The first of the warrants mentioned was paid when due.

"Warrant No. 29 was not registered under the Budget Act (General Acts 1935, page 803). Is this warrant now valid? Is it payable now? Should it be reissued under the Budget Act? Would it be legal for me to pay this warrant or reissue it?

"I might mention that this warrant was presented for payment in January 1933 when due and at other times since. However the warrant has not been registered and does not appear in the State Examiners report.

"Your prompt reply would be appreciated."

If the warrant mentioned in your inquiry was issued strictly in accordance with provisions of Acts 319, Local Acts of 1931, page 155, it is my opinion that the same is valid.

The Financial Control Act of 1935 (General Acts of 1935, page 803) authorizes that warrant to be refunded. Section IX of said Act is the authority for the warrant to be refunded. If funds are available, I see no objection to the payment of the warrant.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Hon. Haygood Paterson, Sheriff,
Montgomery County,
Montgomery, Alabama.

Alabama Beverage Control Act—Repeals Sections 4793-4800 inclusive, so far as these sections attempt to prescribe or regulate the interior arrangements of premises upon which liquor, malt beverages, or wine may be sold as authorized by the Alabama Beverage Control Act.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Please render your opinion on the following question: Is Article 14 Sections 4793-4800 pages 569-571 of the Criminal Code of 1923 invalidated by section 61 of the Alabama Beverage Control Act."

It is my opinion that the Alabama Beverage Control Act in so far as the provisions thereof permit the sale of beverages therein defined upon premises for which a permit may be issued pursuant to said Act, supersedes the provisions of Sections 4793-4800, inclusive, Code of Alabama. 1923.

Section 61 of the Alabama Beverage Control Act provides that: "All laws and parts of laws in conflict herewith, either special or general except as herein otherwise specially provided are hereby repealed."

Section 1, sub-sections (c), (f) and (o) define the premises upon which intoxicating liquors as well as beverages and wines may be sold.

Section 11, (a) of the Act authorizes liquor licenses to issue to hotels, restaurants and clubs. The same Section (b) requires the applicant shall file a verified application with the Board for a permit to sell liquors. This Section further provides that "Every such application shall contain a description of that part of the hotel, restaurant or club, for which the applicant desires a license and shall set forth such other material, information, description or plan of that part of the hotel, restaurant or club where it is proposed to keep and sell liquor as may be required of the regulations of the Board."

It is my opinion that the rules and regulations prescribed by the Alabama Beverage Control Act, and particularly those referred to herein, conflict with sections 4793-4800. The latter sections therefore must yield to the provisions of the recent Act.

It is further my opinion that the Alabama Beverage Control Act repeals said Code Sections 4793-4800, in so far as the latter sections regulate or control the interior of the licensed premises upon which malt or brewed beverages are sold.

Section 23 (c) provides as follows:

"No retailer shall sell any malt or brewed beverages for consumption on the licensed premises except in a room or rooms or place on the licensed premises at all times accessible to the use and accommodation of the general public; but this section shall not be interpreted to prohibit a hotel or club license from selling malt or brewed beverages in any room of such hotel or club house occupied by a bona fide registered guest or member entitled to purchase the same."

The above quoted paragraph in my judgment conflicts with Sections 4793-4800 and therefore, repeals said sections, so far as there is a conflict. I do not think that the regulatory Code Sections mentioned herein have any application to premises upon which malt or brewed beverages are sold pursuant to a license issued in conformity to the provisions of the Alabama Beverage Control Act.

The same thing may be said with reference to premises upon which wine is sold.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Hon. S. P. Poyner,
Judge of Probate
Houston County
Dothan, Alabama.

1. County Financial Control Act not applicable to revenues derived from the proceeds of a tax levied for the purpose of erection, construction or maintenance of necessary public buildings or bridges or roads as provided for in Section 215 of the Constitution of 1901 and Sections 217 and 218 of the Code of Alabama of 1923.

2. Houston County may legally issue interest bearing warrants to become due in future years for the purpose of financing the construction of a jail where such warrants are to be retired only out of the proceeds derived from the tax levied under the provisions of Section 215 of the Constitution of 1901 and Sections 217 and 218 of the Code of Alabama of 1923.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of February 4, 1937, which is as follows:

"The Houston County Jail stands condemned. Application is filed with P. W. A. for a grant to build a Jail and Office Annex combined adjacent to the Court House. It will be necessary for the County to expend about \$50,000.00 as its share. The banks are anxious and willing to lend us the money on any kind of terms we demand and at a low rate of interest. Our bonded indebtedness stands at \$150,000.00 which is about one-third of the constitutional debt limit. Our floating indebtedness is nothing. We pay current expenses on the first of each month. We have approximately \$60,000.00 in the various funds of the County.

"Please advise if we have authority to issue interest bearing Warrants to finance this project same to fall due over a period of years; and if so, under what Act or Section of law.

"I will thank you to give me the correct procedure as it is now necessary to outline this method of financing to the officials of P. W. A. I believe we are about to receive the grant and it is necessary that we act quickly and I will thank you for an immediate reply."

I have heretofore held in opinions recently rendered that the County Financial Control Act (General Acts, 1935, page 803) applies only to the General Fund of the County in so far as its budget provisions are concerned. In opinions rendered to Probate Judge Howard of Elmore County (Quarterly Report, Vol. V, page 38), and to Probate Judge Tompkins of Colbert County (Quarterly Report, Vol. V, page 32), I held that, regardless of the County Financial Control Act, counties could issue warrants payable at a future date out of the Gasoline Tax Fund.

The same rule, in my judgment, applies to warrants payable solely from revenues derived from taxes levied under the provisions of Section 215 of the Constitution of 1901 and Sections 217 and 218 of the Code of Alabama of 1923.

I am of the opinion, therefore, that Houston County, for the purpose of erecting a combination jail and office building, may legally issue interest bearing warrants to be retired over a period of years out of the proceeds of a tax levied and collected under the above cited constitutional and statutory provisions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Hon. J. R. White, Chairman
Walker County Board of Revenue
Jasper, Alabama.

1. There is no legal obligation on County to continue paying monthly salary to County employee during the time such employee is absent from his duties as a result of injuries received in line of duty.

2. County may lawfully aid in maintaining and taking care of sick or wounded employee, who is unable to provide for himself, in a hospital.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of inquiry as follows:

"The Board of Revenue of Walker County wants an opinion as to whether County Employees receiving injuries while on duty for the County, whether or not County is liable for damage in such cases.

"Would we be within our rights to pay employees wages for the time lost caused from injuries received by him while on duty.

"Would we be within our rights to pay employees doctor and hospital bills.

"The party injured was not connected with bridge work nor accident did not happen on bridge."

It is my opinion that your County is under no legal obligation to pay the salary of an employee who is absent from his duties or work on account of his injuries received while in line of duty. I refer you to an opinion rendered by this office on the same subject, dated January 11, 1932, reported in Biennial Report of the Attorney General, 1930-1932, page 635. It appears from the letter of inquiry that one Mr. Watt who was an employee of the County was injured in line of duty and was confined to the hospital. The following question was asked: "May the County legally pay Mr. Watt the amount of his salary for each month he has been in the hospital?" The answer of the Attorney General was as follows:

"In answer will state that there is no legal obligation to the County continuing to pay the monthly salary to a County employee during the time such employee is absent from his duties due to injuries incurred in line of duty. This is a matter within the discretion of the officer or Board of the County employing such person."

Answering your second question, the County is authorized to pay, under certain conditions, the hospital expenses of an employee who is injured in line of duty. This right to pay such expenses does not grow out of the relationship of employer and employee, but is one authorized by Section 1201 of the 1923 Code of Alabama which I quote as follows:

"The board of revenue or court of county commissioners of any county in this state having a population of over twenty-five thousand people may make appropriation out of their respective county treasury to aid in maintaining and taking care of sick, and wounded persons who are unable to provide for themselves in any hospital maintained in their respective counties exclusively for the care of the sick and wounded."

I refer you to an opinion rendered by this office on April 15, 1936 reported in Volume 3, of the Quarterly Report of the Attorney General, and from this opinion I quote as follows: "In my opinion the hospital bill of the injured employee could not be paid under the authority of the above quoted Section (Section 1201) merely because the injured person was or is an employee of the County and was injured in the line and scope of his duty." This Section specifically provides that only those "who are unable to provide for themselves" may receive the benefits provided for in this Section. The question of fact arises here and one upon which this office is not in a position to rule. This is a question which addresses itself to the discretion of the Board of Revenue. I do not think it necessary to amplify the quotations which I have given above, for I believe you readily observe that your authority to pay the hospital expenses of this injured employee is dependent upon the financial ability of the employee to pay his own expenses. The financial condition of this employee is a question of fact for the determination of your Board of Revenue.

Section 1201 of the 1923 Code of Alabama, was amended as shown by Acts of 1932, page 335, but the amendment made no material change in the law other than to eliminate the minimum population as a condition to the exercise of authority under the law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 2, 1937

Hon. J. P. McKee, Chairman,
Court of County Commissioners,
Washington County,
Chatom, Alabama.

Statutes—Local Act—Washington County—

1. Section 2 of Act No. 216, Local Acts 1931, page 80, approved May 28, 1931, as amended by a Local Act of the 1936-37 Session of the Legislature, approved February 4, 1937 is now in full force and effect.

2. Official charged with the payment of moneys pursuant to the provisions of said Acts held not liable, either individually or on his official bond, for the repayment of the same in case the

said Acts or either of them are subsequently declared unconstitutional.

3. Persons to whom moneys are paid pursuant to the provisions of said Acts held not liable for the repayment of the same in case the said Acts or either of them are subsequently declared unconstitutional.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 12, 1937, which follows:

"The Legislature of Alabama by Act No. 216, Local Acts, 1931, at page 80, approved May 28, 1931, made the Court of County Commissioners and the Probate Judge of Washington County a Board of Road Supervisors in addition to their duties as a Court of County Commissioners and prescribed their duties and fixed their salaries therefor. The pertinent section of this act which makes the Court of County Commissioners and Probate Judge of Washington County a Board of Road Supervisors and fixes their compensation therefor is Section 2. The Legislature of Alabama passed a Local Act in the 1936-37 Session which was approved February 4, 1937, to amend Section 2 of the 1931 Act referred to above.

"Please let me have your opinion on the following questions in regard to the 1931 Act, *supra*, as amended by the 1937 Act, *supra*:

"1. Is the 1931 Act, as amended by the 1937 Act now in full force and effect?

"2. Will any moneys paid pursuant to the provisions thereof to the members of the Board of Road Supervisors of Washington County by the official charged with payment of the same be charged back to said official, either individually or on his official bond, in case the said Acts or either of them are subsequently declared unconstitutional?

"3. Should said Acts, or either of them, be subsequently declared unconstitutional, will the respective persons to whom the moneys are paid pursuant to the provisions of these Acts be liable therefor."

My answer to your first inquiry is in the affirmative. Section 2 of Act No. 216, Local Acts 1931, at page 80, approved May 28, 1931, as amended by a Local Act of the 1936-37 Session of the Legislature, approved February 4, 1937, not having been repealed or held unconstitutional by the courts, is now in full force and effect.

My answer to your second inquiry is in the negative. The official charged with the payment of moneys pursuant to the provisions of the 1931 Act, *supra*, as amended by the 1937 Act, *supra*, to the members of the Board of Road Supervisors of Washington County could not have said moneys charged back to him, either individually or on his official bond, in case the said Acts or either of them are subsequently declared unconstitutional. I call your attention to Section 2619 of the Code of Alabama, 1923, which reads as follows:

"2619. Officer paying and person receiving money paid under void law, not liable therefor.—When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law of Alabama, general or special, which law, subsequent to such collection or paying out, shall be declared

by the supreme court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable, either individually or on his official bond, in any suit brought for the recovery of such money, so collected or paid out, nor shall the person to whom the same shall have been paid, be liable therefor."

My answer to your third inquiry is likewise in the negative. If the said Acts or either of them are subsequently declared unconstitutional, the persons to whom the moneys are paid pursuant to the provisions of these Acts would not be liable therefor. See Section 2619, supra.

Nothing herein contained shall be construed as expressing an opinion on the constitutionality of either of the Acts here dealt with, as that question is not now before me.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 3, 1937

Hon. E. Dick Burrows,
Sheriff Walker County,
Jasper, Alabama.

Alabama Beverage Control Act—

1. Alcoholic beverages, including liquor, legally purchased in a wet county in Alabama, can be legally possessed in a dry county in Alabama.

2. Since the Act places no limit on the amount of alcoholic beverages, including liquor, that can be legally purchased in a wet county, there is no limit, so far as the provisions of the Act are concerned, on the amount of such beverages, so purchased, that may be legally possessed in a dry county in Alabama, so long as the same are not possessed for the purpose of sale or distribution.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 17, 1937, asking certain questions concerning the status of alcoholic beverages in the dry counties in the State of Alabama. I likewise have similar inquiries from the Alabama Alcoholic Beverage Control Board and from a number of law enforcement officers, including several sheriffs of the various counties and several chiefs of police of various municipalities. I shall, in this opinion, answer the inquiries in this regard made by all of you.

You request my opinion as follows:

1. Can alcoholic beverages, including liquor, legally purchased in a wet county in Alabama be legally possessed in a dry county in Alabama?

2. If so, is there any limit on the amount of such beverages, so purchased, that may be legally possessed in a dry county in Alabama?

At the outset I might say that by the terms of the Alabama Beverage Control Act a wet county is a county in which the majority of the electors voting in the March 10th referendum voted in the affirmative, and a dry county is a county in which the majority of the electors voting in the March 10th referendum voted in the negative. Further, the term "legally purchased", as used in this opinion, means purchased in accordance with the provisions of the Alabama Beverage Control Act.

There are several references in the Alabama Beverage Control Act to alcoholic beverages in dry counties. These will here be set out in order in which they appear therein.

Sub-section (c) of Section 6, which is the section dealing generally with the functions, duties and powers of the Alcoholic Beverage Control Board, reads, in part, as follows:

"* * * No store shall be established in, and neither the Board nor any other person may legally **buy, manufacture, or sell** alcoholic beverages in any county which has voted in the negative in any election called as herein provided for determining the said issue, unless and until said county has at a subsequent similar election voted in the affirmative.* * *" (Emphasis ours).

Section 51, which is the section providing for the referendum to be held in the various counties in the State, reads, in part, as follows:

"In every county where a majority of the electors voting in said election vote 'yes', this Act, and all of its provisions, shall be immediately put into operation in such County, but in every county where a majority of the electors voting in said election, vote 'No', this Act shall not go into effect in such county, and all laws prohibiting the **manufacture, and sale** of alcoholic liquors or beverages now in force and effect in Alabama shall remain in full force and effect in every such County. (Emphasis ours).

This same section elsewhere provides as follows:

"In all dry counties, as defined in this section, the statutes of Alabama prohibiting the **manufacture, sale or distribution** of alcoholic beverages shall remain in full force and effect, and any person, firm or corporation convicted of violating any of the provisions of the present statutes of Alabama regulating or defining the illegal **manufacture, sale or distribution** of alcoholic beverages shall be punished as now provided by such laws." (Emphasis ours).

Section 52 reads as follows:

"Unlawful to **sell** alcoholic beverages in dry counties—It shall be unlawful to **sell** alcoholic beverages within any county where the electors have voted against such sales, except as authorized by Section 18 herein." (Emphasis ours).

It might be well to here note that Section 18 is the section providing for the issuance of Public Service Liquor Licenses to railroad or pullman companies, permitting the sale of alcoholic beverages in dining, club or buffet cars, to passengers for consumption while en route on such railroads and to steamship companies, permitting alcoholic beverages to be sold in the dining compartments of steamships or vessels.

It will be noted that none of the above provisions of the Act, which are the provisions dealing with the subject of alcoholic beverages in dry counties, makes any mention whatever of **possession**. Nowhere in the Act is there any restriction whatever on any prohibition against the possession of legally purchased alcoholic beverages, including liquor, in a dry county. Since the Legislature repeatedly dealt with the subject of alcoholic beverages in dry counties, as shown by the above quoted provisions, and nowhere placed any restriction on or made any prohibition against the **possession** of such beverages in such counties, though it did place such prohibition against the **purchase, manufacture, sale or distribution** of alcoholic beverages in such dry counties, it is my opinion that, following the maxim of law—"expressio unius est exclusio alterius"—"the expression of one thing is the exclusion of all others", it was very clearly the intention of the Legislature that alcoholic beverages, including liquor, legally purchased in a wet county in the State of Alabama could be legally possessed in a dry county in the State of Alabama.

That it was the intention of the Legislature that alcoholic beverages, including liquor, legally purchased in a wet county in Alabama, could be legally possessed in a dry county in Alabama is ostentatiously revealed by the journals of the recent session of the Legislature which enacted the Alabama Beverage Control Act. An examination of the journals shows that at the time the Senate passed the Act which was H. 44, as amended by it, and sent it back to the House of Representatives, the house in which it originated, for further action, it contained, in Section 51 a prohibition against the **possession** of alcoholic beverages in dry counties, as well as the prohibitions which the Act, as finally passed, contains against the **manufacture, sale and distribution** of such beverages in such counties but that the conference committee appointed by the two houses to adjust the differences between them on this subject, rewrote Section 51, retaining the prohibitions contained therein against the **manufacture, sale or distribution** of alcoholic beverages, including liquor, in dry counties, but omitting therefrom the prohibition against the **possession** of such beverages in such counties.

This clear intention of the Legislature to make legal the possession in a dry county of legally purchased alcoholic beverages, including liquor, in a wet county, effectuated a repeal of the existing laws of the State of Alabama prohibiting the possession of alcoholic beverages, in so far as the same might apply to legally purchased alcoholic beverages when possessed in a dry county. The Alabama Beverage Control Act deals with the whole subject of alcoholic beverages in the State of Alabama. By this Act, the State of Alabama departed from its "bone dry" policy of more than twenty years, which outlawed all alcoholic beverages (except since 1932, near beer containing not more than one-half of 1% alcohol. See Act No. 54, General Acts of 1932, Extra Session at page 56, passed over Governor's veto on October 6, 1932). By this Act, alcoholic beverages were once more made legal in the State of Alabama, subject to the provisions of the said Act. The Alabama Beverage Control Act deals in detail with the whole subject matter of alcoholic beverages in the State of Alabama. It is a complete new enactment on this subject. Since, as pointed out above, the legislative history of the Act, as disclosed by the journals of the Legislature, and the Act itself, show a clear intention on the part of the Legislature to repeal the existing statutes of the State of Alabama prohibiting the possession of alcoholic beverages, in so far as they apply to legally purchased alcoholic beverages when possessed in dry counties, it is my opinion that the existing statutes prohibiting possession of alcoholic beverages, in so far as they apply to such beverages, including liquor, legally purchased, when possessed in a dry county, and repealed by necessary implication. In arriving at this conclusion, I am not un-

mindful of the general rule of law that repeal of statutes by implication is not favored. Such a holding, in my opinion, is not a departure from this rule.

In *Levy, Aronson & White v. Jones*, 208 Ala. 104 at page 106, the Supreme Court of Alabama in dealing with a similar situation to the one now before us, after taking cognizance of the rule that repeal by implication is not favored, spoke as follows:

"If effect can, however, be given, consistent with the legislative intent, to a part of the provisions of the old statute, without violation of the provisions of the new, repeal by implication of the old statute by the new will be held to be only partial—to the extent of the modification of the conflict."

An intention to repeal an Act may be gathered from its repugnancy to the general course of subsequent legislation. *State v. Matthews*, 209 Ala. 193.

Therefore, it is my opinion that alcoholic beverages, including liquor, legally purchased in a wet county in Alabama, can be legally possessed in a dry county in Alabama.

The Alabama Beverage Control Act places no limit on the amount of alcoholic beverages that may be legally purchased. Since this Act places no limit on the amount of such beverages that may be legally purchased in a wet county, and since, as I have held hereinabove, such beverages so purchased in a wet county may be legally possessed in a dry county, it necessarily follows that there is no limit on the amount of alcoholic beverages legally purchased in a wet county that may be legally possessed in a dry county in Alabama, so far as the provisions of the Act are concerned. However, since the Act, as appears from the provisions thereof hereinabove quoted, makes unlawful the purchase, manufacture, sale or distribution of any alcoholic beverages in a dry county, the possession of legally purchased alcoholic beverages in a dry county for the purpose of sale or distribution would be illegal. The quantity of such beverages which one has in his possession might shed light upon the purposes for which he possesses the same. Of course, it would be a question for the Court or jury, as the case might be, to determine from the facts in each individual case whether or not the possession of a given quantity of such alcoholic beverages was for an illegal purpose. See *Toole v. State*, 170 Ala. 41, at page 55.

It might be well to here point out that all alcoholic beverages, other than those manufactured, transported, sold and distributed in accordance with the provisions of the Alabama Beverage Control Act, are still illegal and that the existing statutes in regard to the possession of the same are still in full force and effect. In this connection, I call your attention to the following provisions from Section 51 of the Alabama Beverage Control Act:

"In all Counties of the State it shall be unlawful for any person, firm or corporation to have in his or its possession any still or apparatus to be used for the manufacture of any alcoholic beverage of any kind, or any alcoholic beverage of any kind illegally manufactured, or transported, within the State, or imported into the State from any other place without authority of the Alcoholic Control Board of the State, and any person, firm or corporation violating this provision or who transports any illegally manufactured alcoholic beverages, or who manufactures illegally any alcoholic beverages, upon conviction shall be punished as now provided by law."

and to the following provision of Section 61 of the Act:

" * * * And nothing herein contained shall be construed as repealing any of the laws of Alabama relating to the manufacture, or possession of illicit distilled liquor or apparatus for the manufacture of the same * * *."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 5, 1937

Hon. H. R. Denton,
Treasurer, Blount County,
Oneonta, Alabama.

Officers—An officer who holds over is entitled to full compensation provided he does so by authority of law.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of March 2, 1937, in which you state:

"I was elected last November 3rd to succeed myself as County Treasurer. I had the misfortune to lose my home and contents by fire and failed to qualify as required by law. I was appointed by the Governor on the 15th day of January and within a few days after said appointment I filed my bond, but the Probate Judge held that the Commissioners could not accept the same until their regular meeting date which is the 2nd Monday in each month and therefore my bond was accepted on 8th day of February; it was made by the National Surety Company. Then I received my commission on the 11th of February which was dated in Montgomery on the 10th of February.

"The Probate Judge refused to pay me my salary for the month of January claiming that the office was declared vacant due to my failure to qualify, and as my old bond only held good until January 1st, and then for the month of February he has only allowed me three-fourths of my salary.

"I contend under Section 2569 I am entitled to full pay."

In my opinion you are entitled to full compensation for the months of January and February, as you were holding the office of County Treasurer of Blount County under your first elective term until your successor was elected and qualified, or until you were appointed and qualified.

Section 300 of the 1923 Code of Alabama provides as follows:

"Section 300. Election and term of office.—A county treasurer for each county not having a county depository or other custodian of its funds in lieu of the county treasurer is elected by the qualified voters thereof, who holds office for four years from the first Monday after the second Tuesday in January next after his election and until his successor is elected and qualified."

In the case of Commonwealth vs. Kelly, 185 Atlantic page 307, the Supreme Court of Pennsylvania in May, 1936, said:

"* * * The questioned weight of modern authority holds that where an officer is appointed or elected for a specified term, he continues to hold over until his successor has qualified, unless there is an express legislative mandate to the contrary, * * * the public interest cannot be permitted to suffer by the failure to fill an office and that the acts of an officer functioning after the expiration of his term could be sustained as those of a de facto officer. * * *"

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

April 14, 1937

Hon. J. A. Keller, Superintendent,
Department of Education
CAPITOL.

Alabama Luxury Tax Act —

Liability of State-supported Institutions of higher learning and elementary and high schools for collection of payment of luxury tax.

1. Not required to pay tax on coal, water, floor oil, mops, sweep-
ing compound and other building supplies.

2. Not required to pay tax on lumber, nails, glass, etc. used for
maintenance purposes.

3. Not required to pay tax on supplies bought for use in the class-
room or laboratory, such as chalk, erasers, chemicals, etc.

4. Not required to pay tax on supplies purchased with laboratory
fees collected from students for the purpose of maintaining equip-
ment and furnishing materials used by students, such as manual
training and domestic science fees.

5. Not required to pay tax on supplies purchased with labora-
tory fees collected from students for purpose of maintaining equip-
ment exclusively, such as breakage fees, or contingent fees.

6. Required to collect tax on basket ball, baseball, football, and
other athletic contests, where admission is charged.

7. Required to collect tax on plays, lectures, and entertain-
ments where admission is charged.

8. Required to collect tax on tablets, pencils, erasers, etc.,
when sold by school book stores.

9. Not required to pay tax on materials and equipment for capi-
tal outlay purposes when purchased by state, local, or federal funds.

10. Required to collect tax on candy, nuts, chewing gum, pop-
corn, etc., sold in the school.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your communication of recent date which I quote as follows:

"Numerous inquiries from educational authorities have come to this office concerning the application of the recently enacted Sales Tax Law (H. B. 179, approved February 23, 1937). In order that I may have available a comprehensive interpretation of this application of this measure, I hereby request your opinion concerning the following questions:

"Are state-supported institutions of higher learning and elementary and high schools required to pay the sales tax on the following:

"1. Coal, water, floor, oil, mops, sweeping compound, and other building supplies.

"2. Lumber, nails, glass, etc. used for maintenance purposes.

"3. Supplies bought for use in the classroom or laboratory, such as chalk, erasers, chemicals, etc.

"4. Supplies purchased by laboratory fees collected from students for the purpose of maintaining equipment and furnishing materials used by students, such as manual training and domestic science fees.

"5. On supplies purchased by laboratory fees collected from students for purpose of maintaining equipment exclusviely, such as breakage fees, or contingent fees.

"6. On basket ball, baseball, football, and other athletic contests, where admission is charged.

"7. On plays, lectures, and entertainments where admission is charged.

"8. On tablets, pencils, erasers, etc. when sold by school book stores.

"9. On materials and equipment for capital outlay purposes when purchased by state, local or federal funds.

"10. On candy, nuts, chewing gum, popcorn, etc. sold in school."

It is my opinion that state-supported institutions of higher learning and elementary and high schools are not required to pay any tax on purchase of articles mentioned in questions numbered 1, 2, 3, 4, 5 and 9.

It is further my opinion that such institutions, elementary and high schools, should collect and remit the tax on the athletic contest mentioned in question 6; should collect and remit the tax on the entertainments, plays, lectures mentioned in question 7; should collect and remit the tax on articles mentioned in questions numbered 8 and 10.

The state-supported institutions in Alabama are the immediate agencies of the State and the property belongs to the State of Alabama. These institutions are under the immediate direction and control of the State of Ala-

bama. **Shepherd v. Jones**, 153 So. 223. The Tax Act, Section 2, subsection (f), provides as follows:

"* * * and there shall also be excepted from the gross receipts of sales so as not to be taxed so much thereof as is derived from sales of merchandise and commodities to incorporated cities and towns and the State of Alabama, where such commodities are purchased for lawful municipal or state purposes."

This exemption of commodities sold to the State of Alabama includes the exemption of commodities sold to institutions of higher learning supported by the State of Alabama. Such institutions are a part of the State of Alabama and are specifically exempted by the terms of the Act. **Shepherd v. Jones**, *supra*.

The operation of elementary and high schools in the State of Alabama is a state function. **The State v. County of Tuscaloosa**, (Ms), **Williams, Superintendent of Banks v. State**, 161 So. 507, Section 191 of the School Code of Alabama read as follows:

"The **general administration and supervision** of the public schools and educational interests of each city shall be vested in a City Board of Education to be composed of five members who shall be residents of such city, and who shall not be members of the City Council or Commission. The members of such City Board of Education who shall serve without compensation.* * *"

If a city owns a building which houses either the elementary or high school or both, items bought for repairs of building, would be exempt from tax because the cities or towns are exempt.

The incidental or laboratory fees mentioned in your letter and used to purchase supplies are a part of lawful funds exacted for operations of the schools. Sections 182 and 467, School Code, 1927. These fees are subject to the control of the State of Alabama and belong to the State, having been exacted from the pupils under the State authority. The articles purchased with these funds are not subject to tax any more than articles purchased by other public funds of the State of Alabama.

The athletic contest mentioned in question 6 of your letter, are not strictly school functions, even though, students are the only active participants therein. These contests are permitted but not required. It is my opinion that if an admission is charged therefor, that the tax imposed by Section 2 (c) of the Act should be collected and remitted.

Referring to question 7 of your letter, plays, lectures and entertainments often have cultural value and they are to be commended. However, the funds derived from such entertainment do not constitute a part of the State funds because there is no law requiring or authorizing admission charges to be made. It is my opinion that tax should be collected and remitted pursuant to the mandates of Section 2 (c) of the Act.

The Act grants an exemption to amounts received from the sale of text books used in elementary schools, high schools and institutions of higher learning, Section 4(g) but I can find no exemption of amounts received from the sale of items mentioned in question 8. The book stores should collect this tax and remit it to the State of Alabama.

I can find no exemption granted by the terms of the Act to amounts received from the sale of items mentioned in question 10 of your letter. The Act exempts the amounts received from the sale of lunches to school chil-

dren in school buildings within the State when sold by any person, association or group not for profit, but grants no exemption as to the items mentioned in question 10.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 16, 1937

Hon. M. E. Pritchett,
Tax Assessor,
Marengo County,
Linden, Alabama.

Supreme Court held to
contrary in opinion not yet
reported.

Taxation—Homestead Exemption—Act No. 107, General Acts of the Legislature, Special Session 1936-37 authorizing homestead exemptions does not apply to taxes assessed as of October 1, 1936 and due October 1, 1937, but begins with taxes to be assessed as of October 1, 1937 and payable October 1, 1938.

Opinion by the Attorney General.

Dear Sir:

I beg to acknowledge receipt of your letter of February 25, 1937, as follows:

"Section 2. Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937.

"Does the above apply to the 1937 taxes which were assessable October 1st, 1936 and due October 1st, 1937, or is it to begin with the 1938 taxes which will be assessable October 1st, 1937?"

Your letter refers to an Act of the Legislature approved February 20, 1937, relating to homesteads. The Act provides as follows:

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and Laws of the State of Alabama.

"Section 2. Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937.

"Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars (\$2,000.00) in assessed value, nor one hundred sixty (160) acres in area."

You inquire: "Does the above apply to the 1937 taxes which were assessable October 1, 1936, and due October 1, 1937, or is it to begin with the 1938 taxes which will be assessable October 1, 1937?"

The pertinent section of the Act of February 20, 1937, provides:

"Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937."

What is desired here, of course, is to ascertain the legislative intent.

I beg to call your attention to an Act of the Legislature, approved February 23, 1937, commonly referred to as Sales Tax Act. Section 21 of the Sales Tax Act provides the manner in which funds derived from the Sales Tax law shall be divided and distributed. Section 21 provides, among other things, the following:

"Before division and distribution, the expenses of the administration of this Act and also so much thereof as may be necessary for the replacement in the Public School Fund of the three mill constitutional levy for schools and in the General Fund of the one mill levy for soldiers' relief and the two and one-half mills for general purposes lost by any exemption of homestead provided by legislation enacted during Special Session 1936-37 of the Legislature of Alabama shall be charges against the proceeds of said licenses, taxes, or receipts levied or collected under this Act."

It will be noted that Section 21 of the Sales Tax law provides that repayment to the Public School Fund, to the General Fund and the Old Soldiers Fund may be made only in respect of homestead laws passed during the Special Session 1936-37. This limits the consideration of homestead acts to the Act of the Legislature, approved February 20, 1937. The Act approved February 20, 1937, is the only Homestead Act passed under which reimbursement from Sales Tax revenues may be made. A careful consideration of the entire Sales Tax Act (approved February 23, 1937) is convincing to the point that it was the intention of the Legislature that all tax losses to the State caused by homestead exemptions should be replaced by proceeds from the Sales Tax Law.

I do not believe, in enacting the homestead exemption law of February 20, 1937, and the Sales Tax Law of February 23, 1937, it was the intention of the Legislature that the several funds that are depleted or taken from, in order to make homestead exemptions possible, should remain so depleted, but that these depleted funds (Public School Fund, General Fund and Old Soldiers Fund) should be repaid in full from the proceeds of the Sales Tax Act. In other words, it is my judgment that the Legislature intended that the repayment provisions of Section 21 should run hand in hand with the homestead exemption provisions of Act of February 20, 1937, to the end that the losses incurred by each of the above mentioned funds should be reimbursed from the Sales Tax revenues, and that there should not be any intervening period involved. I do not think it was the intention of the Legislature that there should be an exemption of homesteads for any period for which reimbursement is not provided from Sales Tax funds. It is my judgment that the Homestead Act of February 20, 1937, means exactly what it says: That "homesteads, as defined in the Act, are exempted from all State ad valorem taxes beginning October 1, 1937." The Legislature has not said that there is an exemption as to homestead taxes due on October 1, 1937, but that there is an exemption as to homestead taxes accruing on and after October 1, 1937. I do not believe the Legislature intended that the State should be denied the revenue from these homestead exemptions for the tax year beginning October 1, 1936, without providing for a replacement of these funds from the Sales Tax revenues. It cannot be denied that replacement is provided after October 1, 1937, and why should the Legislature provide for replacement as regards every year except the tax year beginning October 1, 1936?"

There are other reasons why I do not believe the Legislature intended to grant exemption as to taxes due on homesteads on October 1, 1937. For illustration: Let us suppose that the homestead exemptions for the tax year

beginning October 1, 1936, amount to one and one-third million dollars. The Sales Tax Act became effective on March 1, 1937. So the Sales Tax Act will be in effect for a period of seven months of the tax year beginning October 1, 1936. It is roughly estimated that the revenue from the Sales Tax Act for these seven months will amount to three and one-half million dollars. It is also roughly estimated that the cost of administering the Sales Tax Act for this period of time will amount to approximately \$30,000.00 Of the balance, three-fourths is turned over to the Alabama Special Educational Trust Fund and the remaining one-fourth is divided equally between the sixty-seven counties of the State of Alabama, one-eighth equally divided among the sixty-seven counties and the other one-eighth divided on a population basis. The Legislature was called for the purpose of assisting schools. If the Act of February 20, 1937 (The Homestead Exemption Act) is construed in such a way as that the homestead exemption taxes due on October 1, 1937, are exempt, and if the estimated amount of one and one-third million dollars worth of homestead exemption taxes due for the tax year beginning October 1, 1936, must be replaced and repaid from the proceeds of the Sales Tax revenue accruing during the seven months of the tax year beginning October 1, 1937, the schools of Alabama would be the losers to the extent of three-fourths of one and one-third million dollars, or, approximately one million dollars. I do not think this was the intention of the Legislature. That the Legislature intended that all funds depleted because of the granting of homestead exemptions should be replaced by and repaid from revenues from the Sales Tax Act there seems to be no doubt.

The lien of the State for ad valorem taxes due for the tax year beginning October 1, 1936, attached on the first day of October, 1936, becomes payable on the first day of October, 1937, and becomes delinquent on the first day of January, 1938.

It is my judgment that the Legislature set October 1, 1937, as the effective date of the Homestead Exemption Act and that the Legislature intended that only ad valorem homestead taxes accruing on and after that date should be exempt. I do not believe it was the intention of the Legislature to exempt ad valorem taxes on homesteads which had accrued on October 1, 1936, and will become due on October 1, 1937.

With reference to the retroactive operation of exemption statutes, I beg to refer you to 61 C. J. 397, as follows:

"Generally speaking, whether property is exempted from taxation must be determined from the law in force at the time the lien for these taxes attaches, a constitution or statute granting an exemption from taxation being generally construed as prospective; and a retroactive provision in violation of a constitutional prohibition being void, except insofar as a subsequent constitutional amendment permits it."

I also beg to refer you to paragraph 417 found at page 406 of 61 C. J.:

"For the purpose of determining whether or not property is exempt from taxation for any year, its status in jurisdictions where all taxable property is required to be assessed at a particular date is to be taken as of that date, so that when a constitutional or statutory provision exempting property from taxation goes into operation on a certain day in the year before the taxes for that year have been assessed, on the day when by law they become a fixed charge on the property, the exempted property is free from taxes for the current year; but it is otherwise when the assessment is completed and the tax books closed before

the day when the statute takes effect, even though the filing of the assessment roll for the actual levy of the tax does not occur until after the exemption provision goes into effect. * * * In some jurisdictions, the exemption statute has been construed to exempt property from which a tax has been assessed but it not yet due or collectible; in other jurisdictions where the change is made within the tax year, an apportionment is made and taxes are computed for the fraction of the year not covered by the exemption. Where the local statute provides that the assessment records shall lie open for a fixed period after the assessment date, an exemption statute which goes into effect within the period but before the day when the records are closed operates as an exemption of property for the current year, and where the statute provides for an assessment period instead of the particular assessment date, it transfers exempt property within the period to one in whose hands it is no longer exempted terminates the exemption."

The laws of Alabama offering an exemption have been construed to be prospective in operation only and as not having the effect of disturbing assessments made and sustained by the taxing authority before the passage of the Act, passed pending an appeal of the cause to the Circuit Court. In the case of *Gassenheimer & Co. v. State*, Ala. App. Ct. Rep. 13, page 506, the Court says:

"The contention that the Court erred in overruling the demurrer is predicated upon the fact that on February 16, 1915, which was after the assessment here involved was made and after such assessment was sustained by the Board of Revenue, after the appeal from the latter's decision was taken to the Circuit Court, but before such appeal was there tried, the Legislature of the State passed an Act (Laws 1915, p. 107) which repeals the statutes that authorize assessments upon solvent credits; it being insisted, in substance, that this repealing act operate retroactively, and that it destroys all assessments based on solvent credits that had not at the time of the passage of the act been collected.

"None of the several cases cited by the appellants in their brief in support of this insistence are exactly in point; but the case of *Hooper v. State*, 141 Ala. 116, 37 So. 662, cited by the Attorney General, is on all-fours with the case here, and it is conclusive against the contention of appellants, since the repealing act here before us, like the repealing act there construed, had reference to subjects of taxation, and bears on its face no indication of a legislative intent that it should operate retrospectively. In such case the general rule of construction is, as stated in the said *Hooper* case that it must be assumed; 'that the legislative intent is that the new enactment shall be of prospective force only, and shall not disturb existing valid assessments.'"—*Hooper v. State*, supra.

The *Gassenheimer* case was affirmed in 193 Ala. 680.

I beg also to refer you to the following quotation from the case of *Hooper v. State*, supra:

"This (referring to the subdivision imposing the taxes and which was left out of the Act of March 3, 1903) was after the date of the return of the taxpayer of his taxes for 1903. This assessment as returned by the taxpayer and made by the assessor, was as of the 1st day of October, 1902, on which date the tax year, ending September 30, 1903, began. The assessment begins October 1st; the fiscal tax year begins and the lien for taxes attaches on that date. * * * At that date, all property described in subdivision 7 (this subdivision was omitted in the new act) was by the statute expressly subjected to taxation; and the money used in

defendant's business, lent out by him and invested in choses in action was taxable. The statute allows no deduction for the taxpayer's liability, as had, at one time, been allowed. The repeal of said subdivision 7 of said section 3911 did not affect the liability of the taxpayer for taxes which had already become a charge on his property. There was nothing in the repealing statute to indicate the intention that it was to be retroactive."

There is nothing in the Act of February 20, 1937, as was said in the case of Hooper v. State, indicating that the Legislature intended the Act to be retroactive and to exempt property upon which on October 1, 1936, under the laws of Alabama, a lien for taxes had fastened. The Act in my judgment is by its specific terms prospective in operation as evidenced by a definite statement that the exemptions should begin on October 1, 1937.

We have not herein considered Section 100 of the Constitution, nor any other section of the Constitution.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

County has no Constitutional right to remit taxes already accrued.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your inquiry of April 7, 1937, in which you request my opinion as follows:

"Herewith is enclosed a copy of an Act passed by the Legislature and approved on April 21, 1936, giving Houston County the right to levy an excise Tax on gasoline. Also is attached thereto a Resolution passed by the Board of Revenue levying said tax and providing for the distribution of same which became effective at midnight of April 30, 1936. This law has recently been declared constitutional by the Supreme Court.

"At the time this law took effect there was in existence a municipal ordinance levying a one cent storage tax on gasoline stored inside the city limits of Dothan. At that time the various distributors had several thousand gallons in their tanks undistributed upon which the city's storage tax had been paid. When this law went into effect repealing the city's ordinance, it forced the distributors to pay a county tax on that amount on hand and on which they had already paid a city storage tax. In other words they paid a double tax on the amount they had in storage at midnight on April 30, 1936.

"The city refuses to refund the municipal tax on these amounts for the reason that their law was not repealed until after the approval of the local act. We would like to reimburse the oil companies for the

amount of tax they paid on the gasoline which was in storage at the time the present county wide tax took effect.

"To do this we planned, if possible, to have the distributors furnish us with a detailed distribution of these amounts on hand and hereafter to deduct from the remittance made to the municipalities the amount that the oil companies had to pay on the gasoline upon which the municipal tax had already been paid.

"Please advise if we can legally deduct from future remittances this tax which was paid the second time by the distributors."

In my opinion, you have no authority to remit this tax or to legally deduct it from future remittances.

As I understand your letter, prior to April 21, 1936, the City of Dothan levied a one cent tax on all gasoline stored within the city limits of Dothan. This ordinance was expressly repealed by the Act approved April 21, 1936, but that statute and the repeal of the ordinance did not affect the right of the City of Dothan to collect municipal taxes on storage of gasoline prior to the repeal of the ordinance.

Thereafter, and on April 27, 1936, the Houston County Board of Revenue passed a resolution levying a county tax as authorized under the Act, which resolution became effective on midnight, April 30, 1936. This tax was levied not on the storage of gasoline but on the sale or distribution thereof.

The Board of Revenue could have so worded said resolution as to except the sale of gasoline on which municipal storage tax had been paid, but this was not done. The act taxed by the resolution of the Board of Revenue is the act of selling or distributing, while the act taxed under the municipal ordinance was the storage of gasoline. It is true that as to gasoline stored prior to April 21, 1936 and sold after April 30, 1936, a double tax is collected, but this tax is upon a different act. On the other hand, as to gasoline stored after April 21, 1936 and sold prior to April 30, 1936, no tax could be collected.

Section 100 of the Constitution provides:

"Sec. 100. No obligation or liability of any person, association, or corporation held or owned by this state, or by any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; provided, that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims."

Under the express terms of this constitutional provision, no obligation of any person to a State, County or Municipality can be extinguished except by payment thereof.

A very similar situation was submitted to the Supreme Court in the two cases of *Union Bank & Trust Company v. Phelps*, 228 Ala. 236, 153 So. 644, and *Union Bank & Trust Co. v. Blan*, 229 Ala. 108. In those cases the Court had before it an Act of the Legislature which contained an express exemption from payment of ad valorem taxes "including those for the current tax year 1931-1932" where the excise tax levied by the Act was paid. Union Bank & Trust Company paid the excise tax provided by the Act and sought to secure the credit allowed by the Act. The Supreme Court held that since

the liability for ad valorem taxes accrued on October 1, 1932, and the Act allowing the exemption was not passed until October 22, 1932, the Legislature had no constitutional power to remit ad valorem taxes or to grant any credit therefor, although such intent was plainly expressed in the Act.

It is my opinion, therefore, that Houston County cannot remit or give credit on the tax levied by the resolution of April 27, 1936 for any amounts previously paid to the City of Dothan under the lawful provisions of their municipal ordinance.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. B. F. Burch,
Tax Collector, Russell County,
Seale, Alabama.

Tax title—The State of Alabama does not lose tax title to land to person who exercises acts of ownership or possession adversely to the State.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 3, 1936, which I quote as follows:

"I request your opinion on the following instance:

"'A piece of property is sold to the State for taxes in the year 1924 and no one has yet bought it from the State, in the year 1930 a party gives this same property in for taxes in a different name from the name that it was sold to the State in and begins paying taxes on it and has done so every since 1930. Six years elapsed from the sale of this property to the State before any taxes were paid on it.' What I want to find out is, 'can this property be bought direct from the State by a different party from the one who has been paying taxes on it since 1930?'"

If the State of Alabama acquired a valid tax title to the lands which you mention in your letter, such ownership of the State is not divested by reason of a party subsequently assessing and paying taxes and exercising acts of ownership and possession over the lands in question. Such act of ownership and possession which are adverse to an individual might possibly, as to an individual, at some time under the laws of Alabama ripen into a title, but there is no adverse possession of land, title to which is vested in the State.

Second Corpus Juris, page 213, Section 443 reads as follows:

"Lands of the State (1) General Rule. The rule (against adverse possession) also applies in favor of the States of the Union; in the absence of a provision making the state subject to the statute of limitations no title by adverse possession can be acquired against the state no mat-

ter how long continued. As otherwise expressed the statute of limitations does not run against the state except with its consent. And the fact that the claimant holds under color of title does not affect the operation of the rule."

Section 8939, Code of Alabama 1923 reads as follows:

"No limitation to certain specified actions by the state to recover land. There is no limitation of the time within which the state may bring actions for the recovery of any of the land mentioned in section 7475 (3859) of this Code."

Section 7475, Code of Alabama is addressed to questions on actions to recover lands belonging to state, as well as to other lands owned by agencies of the State. The following authorities hold that there can be no adverse possession against the State: **Mobile Transfer Co. v. Mobile**, 128 Ala. 335, 30 So. 645; **Adler v. Prestwood**, 122 Ala. 367, 24 so. 999; **Love v. Love**, 65 Ala. 554,

The fact that some one has given in the land and paid taxes would not affect any rights of the State to sell the property to another who makes application.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Mrs. Pauline H. Teague,
Clerk of the Circuit Court
St. Clair County
Ashville, Alabama.

Local Act approved September 1, 1915, (Local Acts, 1915, page 259) gives the Clerk of the Circuit Court assistants only during the term of Court as the terms then existed under Section 3246, Code of Alabama, 1907.

Opinion by Assistant Attorney General Haynes.

Dear Madam:

I have your letter of March 2, 1937 in which you request my opinion as follows:

"Kindly give me your official opinion and construction of Act No. 355, page 259, Local Acts 1915, which provides for an assistant clerk for the Clerk of the Circuit Court of St. Clair County, during term time, both at Ashville and Pell City.

"Does this Act provide for the payment of an assistant in the Ashville office and an assistant (**who is a Deputy**) in the Pell City office from the first Monday in January to and including the last Saturday in June of every year; and from the first Monday after the 4th of July, to and including the last Saturday before Christmas day of every year, (the same being the term time fixed by Act No. 641, page 707, General and Local Acts of 1915) at \$3.00 per day payable out of the County Treasury? Or would this Act be construed to mean only one assistant to serve during the above specified time both at Ashville and Pell City?"

My answer to your first request is in the negative. I think it was the legislative intent at the time of the passage of the Local Act you refer to, to give such assistants during the terms of the Court as they existed then and was not the intent to furnish you assistants during the entire term as now provided by law.

You will note the Local Act you refer to approved September 1, 1915, (Local Acts 1915, page 259) was passed and approved September 1, 1915. While the Act changing the terms of the Circuit Court was approved September 22, 1915 (General Acts, 1915, page 707) this Act is now Section 6667, Code of Alabama, 1923.

Therefore, the clear intent of the Legislature was to cover the terms of the Court as they existed under the Code of 1907, Section 3246. That is the regular term or session of the Court while engaged in trial of cases.

In answering your first request, I have answered your second.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Dr. J. H. McCormack,
Member, Alabama Alcoholic Beverage
Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Alabama Beverage Control Board held to have authority to promulgate a rule or regulation that licensed hotels, restaurants and clubs can sell liquor only in what are known as miniature and half pint bottles.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 23, 1937, which follows:

"I beg to refer you to your opinion of March 23 addressed to Mr. Baldwin, president of the Alabama Beverage Control Board.

"In that opinion, you held that liquor and beer etc. sold by clubs, hotels and restaurants could be sold for on the premises consumption only.

"In the case of liquor, if a hotel, club or restaurant has authority to sell liquor in quart bottles, for example, it seems to me that this would not exactly comport with the idea that the liquor was sold for on the premises consumption only.

"Could the Board not promulgate a rule and regulation to the effect that in hotels, restaurants and clubs liquor could be sold only in

what are known as miniatures, and in half pint bottles? A miniature bottle of liquor contains approximately one and six-tenths ounces. A half pint of liquor contains eight ounces. It is our idea that the 'on the premises' rule of law would be much easier to observe if the hotels, restaurants and clubs were limited to the sale of only miniatures and half pints."

In the opinion to Mr. Baldwin, to which you refer in your letter of inquiry, I held as follows:

"1. Alcoholic beverages sold by licensed clubs, restaurants and hotels cannot be sold for other than 'on-premise consumption'.

"2. A guest, patron or member of a licensed hotel, restaurant or club cannot carry alcoholic beverages bought from such hotel, restaurant or club off the premises, either sealed or after the same have been opened, since alcoholic beverages so sold are for consumption on the premises only."

Section 7 of the Alabama Beverage Control Act reads as follows:

"Section 7. (a) The Board may from time to time make such regulations not inconsistent with this Act as it shall deem necessary for carrying out the provisions of this Act, and from time to time alter, repeal or amend such regulations, or any of them.

"(b) Prima facie evidence of any such regulation may be given in all courts and proceedings by the production of what purports to be an official printed copy of such regulation, alteration, repeal or amendment." and Section 36 of said Act reads, in part, as follows:

"Any rules or regulations of the Board when duly made and promulgated, shall have the full force and effect of law. Any person violating such rule when duly made and promulgated shall be guilty of a misdemeanor and shall upon conviction be fined not less than Fifty (\$50.00) Dollars, nor more than One Hundred (\$100.00) Dollars for each offense."

It is my opinion that the Alabama Alcoholic Beverage Control Board, pursuant to the authority vested in it by the above quoted provisions of the Alabama Beverage Control Act may promulgate a rule or regulation to the effect that hotels, restaurants and clubs can sell liquor only in miniature and half pint bottles. In my judgment, such a rule or regulation would be legal and valid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. Fred H. McDuff,
Sheriff, Jefferson County,
Birmingham, Alabama.

Section 8616, Code of Alabama, 1923 provides for the summoning of jurors by mail, express or by summons by the sheriff.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of March 1, 1937, which is as follows:

"In this County we are serving jury notices by registered mail, which is costing the County approximately \$400.00.

"We have deputies covering the entire county serving civil and criminal papers who could serve these notices in their regular rounds and save the County a great deal of money.

"In sending these notices out by registered mail, about one-third of them are returned by the Post Office Department undelivered for various reasons, then we have to assign these notices to the different deputies covering the various territories to secure service, therefore, we request your opinion upon the following:

"May the Sheriff or his deputies serve these notices without first attempting to reach them by registered mail?

"Will appreciate your usual promptness in this matter."

I refer you to Section 8616, Code of Alabama, 1923, which Section is in words and figures as follows:

"8616. Drawing grand and petit juries from jury box.-- At any session of a court requiring jurors for the next session, the judge, or where there are more than one, "then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these by mail, or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn showing the day on which the jurors shall appear and in what court they shall serve and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons named thereon to appear and serve as jurors."

In view of the provisions of the above quoted section, I am of the opinion the sheriff or his deputies may summons jurors without first attempting to reach them by registered mail.

This opinion is of course based on the general law. I am familiar with the fact that certain parts of the above quoted section have been changed by local legislation affecting counties having a population of 300,000 or more but insofar as my research has gone, I have not found where such legislation affected the manner or methods by which jurors are summoned.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. Charles W. Lee,
State Comptroller,
Capitol.

Pickens County—Local Act 277, Acts of 1935, page 166—Act is unconstitutional.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I refer to your request for an opinion as follows:

"Does Local Act 277 approved August 27, 1935, (Local Acts 1935, page 166) offend Section 96 of the Constitution or any other provision of the Constitution?"

It is my opinion that the Act referred to in your inquiry offends Section 96 of the Constitution and it is therefore unconstitutional and void. Section 1 of the Act referred to provides as follows:

"Section 1. That each member of the County Court of Commissioners of Pickens County, Alabama, shall be paid out of the County Treasury the sum of four (\$4.00) dollars per day while occupied in the discharge of their duties as such members of the Court of County Commissioners of Pickens County, Alabama, and five cents a mile in going to and returning from their respective courts, the sum of three and no one hundredths (\$3.00) dollars while occupied in the discharge of their duties in letting out, inspecting and accepting buildings or repairing of any county bridge, public roads, county buildings or work, and five cents a mile for each mile necessarily traveled by them in performing said duties, the same to be paid on warrants drawn by Probate Judge on the County Treasurer on the order of the Court of County Commissioners but no allowance shall be made for more than ten days in any one month to any member of said Court of County Commissioners, unless upon the specific order made by said Court at the next preceding term of said Court."

The above quoted Section is an attempt on the part of the Legislature to enact a local law regulating costs and charges of courts, or fees, commissions or allowances of public offices, contrary to Section 96 of the Constitution which reads as follows:

"The Legislature shall not enact any law not applicable to all the counties in the State, regulating costs and charges of Courts, or fees, commissions, or allowances of public offices."

A similar local act for Coffee County was declared unconstitutional by the Supreme Court of Alabama for the reason that the act not only violated Section 96 of the Constitution but other Sections of the Constitution. *Carnley, Judge V. Moore*, 218 Ala. Reports, page 274; 1187 Reporter, page 409. The Act above quoted likewise in my judgment offends other sections of the Constitution not necessary here to quote, but which are referred to in the opinion of *Carnley V. Moore, supra*.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

1. Section 3669 of Code of Alabama, 1923, has not been invalidated by Supreme Court or by any opinion of this office.

2. Section 3669 embraces solicitor's fees collected from defendant or from the State Convict Fund.

3. Fiscal year should be used as period for determining surplus under Section 3669.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of the 26th ult. which I quote as follows:

"Has any decision of the Supreme Court, subsequent law or opinion of the Attorney General invalidated Section 3669 of the Code of 1923?

"If not, are Solicitor's fees paid into the County Treasury mentioned in Section 3669 both those collected from the defendants and the state on hard labor cases?

"If Section 3669 is valid what period would be used for determining surplus, fiscal year or calendar year?"

The request contained in the first paragraph of your inquiry is answered in the negative. I am unable to find any decision of the Supreme Court of Alabama which has invalidated Section 3669 nor is there any opinion issued from this office to that effect.

Section 3669 reads as follows:

"The surplus money paid into the State and County Treasuries arising from the solicitor's fees after the solicitors and their assistants have respectively been paid the amount allowed them by law, shall be paid into the fine and forfeiture fund of the respective counties in direct proportion to the amount received from the convictions respectively."

It is my opinion that the foregoing section embraces both the solicitor's fees received from the defendant and from the state. This section makes no distinction as to source but seems to include all fees received from convictions irrespective of the source.

With reference to the inquiry in the third paragraph of your letter, it is my opinion that the fiscal year should be used as the period for determining the surplus. The fiscal year should always be used as an accounting basis for public funds unless there is specific direction to the contrary with local or special application. I am unable to find any exception to this general rule with special application to Section 3669.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. Charles W. Lee,
State Comptroller,
Capitol.

County Commissioners—Have no lawful authority to pay claims filed against County by Commissioners for payment of interest on warrant held by bank.

Probate Judge and his official bond are liable for unlawful payment of interest on warrant held by bank.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"The Commissioners Court has passed various and sundry claims for which warrants have been drawn of the Gasoline Fund. At the time such warrants were drawn funds for the payment of said warrants were not in the hands of the Treasurer. These various and sundry warrants have been placed in the hands of a bank and the persons to whom such warrants were drawn have, to all intent and purposes received proceeds for such warrants from such bank. At a later date the Treasurer, when funds were available, has paid such bank various amounts to retire such warrants. In the interim claims have been filed against the County by various Commissioners for payment of interest to such bank for the period of time such warrants were held by such bank.

"1. Would the payment of interest on such warrants while held by such bank be a legal expenditure against Gasoline Fund?

"2. If illegal expenditure would Probate Judge and his official bond be liable for such expenditure?"

As I construe your letter above quoted, the Commissioner's Court has been issuing warrants which anticipate gasoline funds. These warrants were subsequently paid to the owner. In the meantime claims were filed against the county by various commissioners for payment of interest to such bank for the period of time such warrants were held. You wish to know if payment of interest on such warrants held by such bank is a legal expenditure against the Gasoline Funds?

It is my opinion that such expenditures are unlawful. I know of no law which permits the Commissioners to file claims for and pay interest on an instrument which did not bear interest. I think that the expenditure was unlawful. *Hasty v. Marengo Co. Bank*, 206 Ala. 280, 89 So. 433; *Vincent vs. Gilmer*, 51 Ala. 387.

In answer to your second question, it is my opinion that the Probate Judge and his official bond are liable for the unlawful payment aforementioned. The Probate Judge had no lawful right to approve the warrant for payment of such interest. It was his duty to decline issuance of the warrant. Section 9575, et seq. Code of Alabama, 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. Bart B. Chamberlain,
Circuit Solicitor,
Mobile County,
Mobile, Alabama.

All fees collected by the clerk which go to the Sheriff of Mobile County should not be paid into the County Treasury under local Act approved November 8, 1932, (Local Acts 1932, p. 108) but should be paid directly to the sheriff of said county, and where the sheriff collects judgments and costs on execution or demand, the sheriff should retain such fees as belong to him and pay the balance to the Clerk of the Circuit Court to be distributed by him according to law.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter in which you request my opinion as follows:

"I would like to know whether or not in the opinion of the Attorney General the Clerk of the Circuit Court of this county is authorized to pay directly to the Sheriff fees collected by such clerk and due the Sheriff instead of the Clerk of said court paying it to the treasurer and the treasurer paying the Sheriff. I take it that the same rule governs both courts, however, the Clerk of the Circuit Court will not pay to the Sheriff such fees without an opinion from the Attorney General to protect him."

I do not think the Local Act of Mobile County approved November 8, 1932, (Local Acts, 1932, p. 108) applies to the sheriff of your county for the reason the Sheriff of Mobile County does not come within its terms as he is not on a salary basis as is the tax assessor, tax collector, clerk of the circuit court, register in chancery and judge of probate.

In this connection, I call your attention to Section 2 of said Act, which is as follows:

"Section 2. At the beginning of the next term of office after the approval of this Act, the Tax Assessor, Tax Collector, Clerk of the Circuit Court and Probate Judge, shall during the last five days of each and every month of the year, pay into the County Treasury of Mobile County, all fees, fines and forfeitures collected or received by such officers during the month or part thereof next preceding the date of such payment or settlement; and beginning January 1, 1935, the Register in Chancery of Mobile County, Alabama, shall, during the last five days of each and every month, pay into the Treasury of Mobile County all fees collected by such officer during the month, or part of the month, next preceding the date of such payment or settlement."

You will note this section says all fees, fines and forfeitures collected or received by such officers during the month or part thereof, etc., shall be paid into the County Treasury. Since these officers mentioned in the Act are on a salary paid from the County Treasury, it is clear to my mind that the above provision of Section 2 only has reference to such fees as belong to these officers individually, as such fees and only these mentioned go into the General Fund of the County to pay in part or in whole the salaries of such officers as are paid a salary from the County Treasury. It could not and does not include the Sheriff's fees as he is not now nor never has been on a salary but is paid on a fee basis. Of course, the fines and forfeitures

must be paid into the County Treasury as there is no other place to pay them, but it would be folly to say that the clerk must pay the sheriff's fees into the treasury when these fees go directly to the sheriff and were never intended to be paid to anyone else. The fees cannot be used to pay the salaries of officers now on a salary basis in said county. To say that the records of the county treasurer must be encumbered with a record of these fees, which must be paid back to the sheriff just as the treasurer receives them, would be a requirement of absurdity.

What I have said above has reference to fees belonging to the sheriff, paid to the clerk voluntarily by those due them without the intervention or payment under execution. Now as to the sheriff's fees collected by the sheriff under execution or otherwise, the sheriff is under no duty or provision of law to pay these fees to the clerk or anyone else, but it is his duty to retain the same as they belong to him and no one else, and no one else has any interest in same, and he should, in making his return, state that he is paying into the court or clerk of the court all the judgments, if he has collected all, and all the costs, except \$ _____, sheriff's fees which he has retained, and this return gives the clerk a full record of the whole transaction.

Therefore, I am holding that under no condition fees belonging to the Sheriff of Mobile County, should ever be paid into the County Treasury of said County.

Yours very truly.

A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. John M. Graham,
Tax Assessor,
Jackson County,
Scottsboro, Alabama.

Court of County Commissioners—

Must supply current assessment forms to Tax Assessor.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I quote your inquiry of recent date as follows:

"My information has been that Tax Assessors were allowed and expected to purchase what supplies were actually needed in their office.

"When placing original order with printing company, Marshall Bruce, Nashville, Tennessee, I ordered only what was absolutely necessary so far as I could judge. My supply of blank assessment sheets began to get low and I saw that it was impossible to make the assessments for 1937 tax without more of said sheets and on January 8, I made requisition on special form, presented it to Probate Office of this County and on January 12, when my supply of blanks were exhausted I called at office of Probate Judge and asked if said forms had been ordered. The clerk showed me my requisition or order and asked if I did not have 1936

blanks to use. The blanks for 1936 cannot be inserted into the regular Tax Assessors book without disfiguration and inconvenience both in making books and references to these books in the future, which is quite unsatisfactory for the records of the office now and in the future. To date we are without forms."

It is my opinion that any reasonable expense that you incur for the purchase of current tax assesment forms for official use should be allowed by the county commissioners of your county. Section 9604, Code of Alabama, 1923, provides as follows:

"The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business and telephone to be paid for by the county on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expenses for his seat of office, to be paid for by the county."

According to the provisions of the foregoing section, the court of county commissioners of your county have no lawful right to refuse arbitrarily to pay the reasonable expense which you incur for your official forms.

Yours very truly.

A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. H. E. Hendon,
Tax Assessor,
Macon County,
Tuskegee, Alabama.

Corporations—Corporations organized under Act No. 220, H. B. 275, approved July 17, 1935 (General Acts of 1935, p. 604) are exempt from ad valorem taxation to the extent provided in Section 15 thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 16, 1937, which is as follows:

"The Board of Review of Macon County has requested me to write you for a ruling as to whether the stock of merchandise of the Macon County Farmers Exchange Incorporated is subject to taxation or to exemption.

"I enclose a copy of the application for certificate of incorporation as recorded in the Probate Judge's office.

"The corporation advertises that it sells feeds, garden and field seeds, fertilizers and farming implements.

"The Board of Review is informed that the Corporation sells to anyone, whether a farmer or otherwise, but when a purchase is made the amount and the name of the purchaser is listed. At the end of its fiscal year a net profit is declared, and each member receives his pro-rata share of the net profits."

I also have your letter of March 29, 1937, with further reference to your letter of March 16th.

The articles of incorporation which you enclosed show that the corporation in question was organized under the provisions of Article 21 of Chapter 274 (Sections 7156-7166) Code of 1923. Act No. 220, H. B. 275, approved July 17, 1935 (General Acts of 1935, p. 604) specifically repealed Article 21 of Chapter 274 (Sections 7156-7166) Code of 1923. This necessarily repealed the exemption contained in Section 7161, Code of 1923. If the corporation in question is still operating under the provisions of Article 21, supra, there is no exemption from ad valorem taxation. However, if said corporation has elected to come under the provisions of Act No. 220, supra, in accordance with Section 17 thereof, the exemption provision of Section 15 of said Act No. 220, supra, is applicable.

Assuming that the corporation under consideration has come under the provisions of Act No. 220, supra, I am of the opinion that your inquiry should be answered in the affirmative, provided the merchandise sold to non-members is not in amount greater in value than that sold to members.

Section 9 of Act No. 220, supra, sets out the powers of an association organized under said Act. Among its powers is to purchase for and sell to its members certain merchandise used in connection with farming and to render its members farm business service. Said section provides that it may render service mentioned in said section to non-members as well as members, provided that same shall not be in amount greater in value than such as is rendered to members. The authorization to render this service to non-members as well as members, with limitation above set out, is clearly within the powers of such an association. Therefore, in my judgment, the corporation in question is entitled to the exemption as set forth in Section 15 of Act No. 220, supra, provided its service to non-members does not exceed an amount greater in value than such rendered to members. The selling of the commodities mentioned in your letter to non-members is, in my opinion, such a service as authorized in Section 9, supra.

Section 15, supra, provides as follows:

"Any corporation or association organized hereunder shall pay to the state the annual permit fee of ten dollars now required by law, and shall pay all ad valorem taxes on its real and personal property, except that all cotton and all other agricultural products which have been raised or produced in the state of Alabama, title to which may be held by such corporation or association in its own right or for the use and benefit of its members, and all goods and articles purchased or acquired by such corporation, whether in or out of the state, for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this state, shall, so long as held by such corporation or association, be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this state."

The commodities purchased by the corporation and sold to non-members would be "for its own use", since such an association is authorized to make a profit and pay dividends in accordance with Section 8 of Act No. 220, supra.

Yours very truly.

A. A. CARMICHAEL,
Attorney General.

April 20, 1937

Hon. Gordon Persons, Chairman,
Rural Electrification Authority,
First National Bank Bldg.,
Montgomery, Alabama.

Taxation—corporations organized under the provisions of Act No. 45, H. 135, approved February 7, 1935, (General Acts 1935, p. 100), as amended by Act No. 168, H. 469, approved July 8, 1935, (General Acts 1935, p. 229), are exempt from the provisions of Section 141, but not from Sections 316 and 317 of the Revenue Act of 1935, (Acts 1935, page 256).

Opinion by assistant attorney General Screws.

Dear Sir:

I have your letter of October 21, 1936, which is as follows:

"Section 141 of the 1935 Revenue Bill of the State of Alabama levies, by way of a license tax, four mills on each dollar of gross receipts of electric public utilities for the preceding year. Any corporation establishing a new electric public utility shall pay to the State the sum of \$100.00 and shall also at the same time execute a bond payable to the State of Alabama to insure payment of whatever sum in addition to such \$100.00 may be due when, at the end of the first year, the gross receipts for the year are ascertainable.

"We would like a formal opinion from your office as to whether or not Section 141 applies to the Clark-Washington Electric Membership Corporation, a non-profit membership corporation formed under Act No. 45, H. B. 133, approved February 7, 1935, (General Acts 1935, p. 100,' as amended by Act No. 168, H. B. 469, approved July 8, 1935, (General Acts 1935, page 229).

"Also, please advise us if Section 316 of the Revenue Bill of 1935, which states that all corporations are required to obtain a permit to do business, applies to the above mentioned non-profit membership corporation.

"Also, please advise us if Section 317 of the same Revenue Bill, which levies a tax under the Constitution of Alabama which requires the Legislature to levy a franchise tax upon all corporations except those strictly benevolent, educational or religious, applies to the Clark-Washington Electric Membership Corporation.

"Inasmuch as the electric lines for this Corporation are now under construction, we hope it will be possible for you to render us an opinion within the next few days. When your opinion is rendered we will appreciate it if you will arrange to send us three or four extra copies of same."

I am of the opinion that your first inquiry should be answered in the negative. Your second and third inquiries should be answered in the affirmative.

A careful reading of the Act under which the Clarke-Washington Electric Membership Corporation was organized does not reveal any provision whereby such corporation would be exempt from State taxation.

Section 141 of the Revenue Act of 1935, applies to each person, firm or corporation operating an electric or hydro-electric public utility. The question then presents itself as to whether or not the corporation in question is a "public utility" within the contemplation of said section. In my judgment it is not. It is only a group who have cooperated to supply themselves with electricity, with no purpose of making a profit or of serving the public generally or any portion of the public except those who voluntarily band themselves together to aid in this purely cooperative undertaking.—*Schumacher et al v. Railroad Commission of Wisconsin*, 201 N. W. 214. Moreover, this office has heretofore ruled that said corporation is not subject to regulation and control by the Alabama Public Service Commission.—*Quarterly Report, Vol. III, page 163.*

Section 316 of the Revenue Act of 1935, provides for a corporation fee on every domestic corporation organized under or by authority of laws of the State of Alabama. There is no exemption mentioned as to the nature of the corporation under consideration. This permit fee is "For the purpose of registration and to prevent the duplication of names and in order to secure for the public record, for taxation, and for other purposes, the names and addresses of the said corporations and individual officers thereof. "This purpose is as applicable to this corporation as to any other. While the corporation has only certificates of membership instead of certificates of stock (Sec. 8) and if dissolved, any assets go to the State instead of the members (Sec. 19) this does not seem to excuse taking out a permit. Section 316 requires a permit fee of \$10.00 "if the paid capital stock is less than \$25,000.00." Since this corporation had no paid capital stock, it comes strictly under that language.

Section 317 provides for the levy of a franchise tax on all corporations except strictly benevolent, educational or religious. The corporation in question does not, in my judgment, come within any of the exempted classifications. However, the franchise tax under this Section is "two dollars on each one thousand dollars of its capital stock." Since the corporation does not have any capital stock, no franchises tax seems to be due.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 20, 1937

Hon. James E. Wellden,
Sheriff, Limestone County,
Athens, Alabama.

Pool or Billiard Rooms—Section 4266, Code of 1923, held not to prevent painting of front windows or entrance way so as to prevent clear view of entrance from outside of building.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 17, 1937, in which you request my opinion as follows:

"I wish your opinion and construction of Section 4266 of the Code of 1923, volume 2, relative to the operation of pool rooms.

"We have in our town a pool or billiard room from which we have seized different types of slot machines and condemnation proceedings are now in progress.

"This same pool or billiard room is located on one corner of the public square. The operator thereof has his windows and front entrance so painted that the interior is hidden from view. Please advise if this is a violation of the law."

In reply I wish to advise you that Section 4266, Code of Alabama, 1923, relative to obstructions to pool rooms does not appear to have been construed by either the Alabama Supreme Court or the Alabama Court of Appeals. A search of the Codes of other States reveals no similar statutes.

Section 4266, Code of 1923, provides as follows:

"Section 4266. Screens, blinds, partitions, etc., forbidden.—No billiard room operating under the provisions of this article shall allow or permit any screens, curtains, blinds, partitions or other obstructions to be placed between the entrance, or room where billiards are played and back or rear wall of such billiard room. A clear view of the entire interior from the entrance to the rear of such room must be maintained at all times. No partition forming rooms, stalls or other enclosure where the public congregate, shall be permitted. This provision, however, shall not be construed to prohibit the maintenance of wash rooms, and toilet rooms for proper purposes, or the maintenance of closets for storing purposes exclusively."

I wish to particularly call your attention to the sentence,

"A clear view of the entire interior from the entrance to the rear of such room must be maintained at all times." (Emphasis ours).

It is my opinion that this sentence clarifies this section. In my judgment the painting of the front windows and front entrance so that the interior may not be seen from the outside of the building does not violate the spirit or the letter of this section, it being that the legislature here intended to prevent any obstruction being placed between the front entrance and the back wall of the room, in which a billiard or pool room is being operated, with the exceptions noted within the statute itself. This construction is in my judgment fixed by the words of the statute as follows: "No billiard room operating under the provisions of this article shall allow or permit any screens, curtains, blinds, partitions, or other obstruction to be placed between the entrance, or room where billiards are played, and back or rear wall of such billiard room."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 20, 1937

Hon. L. G. McPherson,
Clerk, DeKalb County Court,
Fort Payne, Alabama.

The fee of \$5.00 charged by the Judge of the County Court organized under the General Law of Alabama cannot become a charge in the DeKalb County Court, organized under a Local Act, 1927, page 93.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 30, 1937, in which you request my opinion as follows:

"Please give me your official opinion as to whether or not I, as Circuit Court Clerk, and ex-officio Clerk of the DeKalb County Court should charge \$5.00 to the defendants in criminal cases in the DeKalb County Court, such charge being collected at County Court Cost. I find no provision for such cost in Local Acts, 1927, page 93, however, the former clerks have been charging such cost since the court was created."

The DeKalb County Court was established by a Local Act approved July 22, 1927 (Local Acts, 1927, page 93) this Act in establishing the DeKalb County Court established a Court independent from and without connection with the County Court of DeKalb County which was organized under the general law of the State and only such fees can be collected by the officers of this court as is provided by said Act. I see no provision for the collecting of a five dollar fee chargeable under Section 3758, Code of Alabama, 1923, and is only applicable to the County Court of DeKalb County established under the General Law of the State. Therefore, it is my opinion the fee cannot be collected in your present court which is designated and known as the DeKalb County Court (Local Acts, 1927, page 93).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 20, 1937

Hon. E. L. Hurst,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Alabama Beverage Control Act—

A municipality located in a dry county in Alabama cannot levy a license on a business located in a wet county in Alabama but within the police jurisdiction of said municipality for the privilege of selling malt or brewed beverages at retail.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 24, 1937, which reads as follows:

"I would thank you to write me with full particulars in regard to the following:

"Can the City of Boaz, in Marshall County, which is a dry county collect City tax from the Oak Park Service Station, which is a mile and 3/10 from the City limits and over a mile in Etowah County, which is a 'wet' county?

"The Oak Park Service, which is owned by Mr. and Mrs. James Bishop, sells lunches, beer, groceries and gasoline, and I want to know if the City of Boaz can collect City tax on any of these items, when their business is over in another county.

"Also please advise me what jurisdiction they have out in Etowah County, and how far out? I would like this information at your earliest convenience, as the City of Boaz is pressing the above parties for taxes. For your information, I wish to say that the Oak Park Service has been doing business continuously for 17 years, and the City of Boaz has never asked for a tax until Etowah County went 'wet' Boaz went nearly 100% 'dry'."

In my opinion, the City of Boaz, which is located in Marshall county, a dry county, cannot levy a license on a business located in Etowah County, a wet county, but within the police jurisdiction of the City of Boaz, for the privilege of selling malt or brewed beverages at retail.

It is true that the Supreme Court of Alabama, in the case of **White v. City of Decatur**, 144 So. 873, held that a municipality could levy a business or occupational license on a business located within its police jurisdiction, even though said business was located in a different county from that in which the municipality was located. However, as pointed out in that case, the authority for levying such a license on a business within the police jurisdiction but outside the corporate limits of a municipality is found in Act No. 580 of General Acts, 1927, at page 674, which reads, in part, as follows:

"That any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town and without the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like businesses, trade or profession done within the corporate limits of such city, fees and penalties excluded."

It will be noted from the above quoted provision of the 1927 Act that the license which a municipality may levy on a business within its police jurisdiction but without the corporate limits thereof may not exceed more than one-half the amount charged as a license for a like business within the corporate limits of the City.

The City of Boaz could not levy a valid license within its corporate limits on businesses for the privilege of selling malt or brewed beverages at retail because the sale of such beverages is prohibited by the Alabama Beverage Control Act in all dry counties within the State of Alabama. See opinions of the Attorney General to Hon. E. Dick Burrows, Sheriff, Walker County, Jasper, Alabama, under date of April 3, 1937, a copy of which is enclosed for

your information. A municipal ordinance inconsistent with the general policy of this State, as declared in its general legislation, is void unless expressly authorized by the Legislature. **Ward v. Markstein**, 196 Ala. 209.

Therefore, since an ordinance by the City of Boaz, located in the dry county of Marshall, on a business for the privilege of selling malt or brewed beverages at retail within its corporate limits would be void as inconsistent with the general policy of the State, as declared by its general legislation, to wit: The Alabama Beverage Control Act, *supra*, it necessarily follows that said municipality could not levy a license for a like privilege on a business located in the wet county of Etowah but within the police jurisdiction and without the corporate limits of said municipality. One-half of nothing equals nothing.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 20, 1937

Hon. Gordon Persons, Chairman,
Rural Electrification Authority,
First National Bank Building,
Montgomery, Alabama.

Municipality—May sell electric current to electric membership corporations.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter which I quote as follows:

"The City of Troy and several other municipalities in this State operate their own electric plant, some generating their own power while others purchase energy at wholesale rates from different private utilities.

"In several instances it is proposed that electric membership corporations formed in this State will purchase power at wholesale rates from the different municipalities. In some cases the membership corporation lines will go directly up to the power station in the heart of each municipality. In others, it is expected that lines from the city station will be extended possibly beyond the city limits and at some point connect with the lines of the corporation.

"The question has been brought up as to whether or not the municipality is within its rights in selling power to these electric membership corporations. The thought occurs to us that if the municipal plant can sell to any business house in its locality, whether a partnership, a corporation organized for profit, or a non-profit organization, it is clearly within its rights to sell to one of our membership corporations.

"We should, however, like a formal opinion from your office on this subject, and, as we very shortly contemplate entering into such contracts in our capacity as engineers, we would appreciate your usual prompt attention."

It is my opinion that the municipality is lawfully authorized to sell current to electric membership corporations.

The authority to make this sale is, in my judgment, granted to municipalities by Section 11(h), Acts of 1935, page 103, authorizing electric membership corporations to purchase electric current, which I quote as follows:

"To make any and all contracts necessary and/or convenient for the full exercise of the powers in this Act granted, including, without limiting the generality of the foregoing, contracts with any person, federal agency, or municipality for the purchase or sale of energy; for the management and conduct of the business of the corporation, including the regulation of the rates, fees or charges for service rendered by the corporation."

I know of no law which deprives the city of the right to make the sale as authorized by the preceding Section.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 21, 1937

Hon. Frank M. Stewart, Secretary,
Alabama State Milk Control Board,
Montgomery, Alabama.

Milk Control Law and authority of Board thereunder construed:

1. Board does not have authority to require distributors to continue purchase from wholesale purchaser previously supplying the said distributor with milk.
2. Board may grant license as purchaser distributor to one already licensed as wholesale purchaser.
3. Foreign corporation may not be exempted from filing bond under Section 12 thereof.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your recent inquiry in which you request my opinion as follows:

"1. Does the Milk Control Act provide the Board with authority to prevent distributors from discontinuing purchases from regular wholesale producers who are now supplying, and have been for some time, the requirements of said distributors for fluid milk purposes?

"2. Does the Act provide the Board with authority to grant a license that is licensed as a wholesale producer an additional license, or the privilege to operate as a producer-distributor.

"3. Does the Milk Control Board have authority as provided in Section 12—Bonds and Enforcement—to exempt a corporation, not incorporated in the State of Alabama, from posting bond with the Board if the Board is convinced after investigation that the financial condition of said corporation is such that producers are responsibly assured of compensation."

I will answer your inquiries in the order that you state them:

1. In my opinion your first inquiry should be answered in the negative. Section 13 (a) of the Milk Control Law, Acts 1935, page 212, gives to the Board the right to revoke a license of a milk distributor upon proof that such distributor has rejected, without reasonable cause, any milk purchased "or has rejected without a reasonable cause or reasonable advance notice, milk delivered in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated." This Act therefore recognizes the right of such distributor to give reasonable advance notice and terminate a previous course of dealing or to refuse to accept milk where the contract therefor has lawfully terminated. Such a broad power or authority to prevent distributors from discontinuing purchases from producers, where there is no binding contract therefor, should not be implied, and, in the absence of express words of the Act granting you such authority, in my opinion, you are without such authority.

2. In my opinion your second inquiry should be answered in the affirmative. Section 13 of the Act defines your powers to grant licenses authorizing the extension of existing business. There is no restriction in the Act preventing you from granting a license as a producer distributor to one who is already licensed as a wholesale producer.

3. In my opinion, your third question should be answered in the negative. Section 12 of the Milk Control Law requires the filing of a bond in a sum of not less than \$2,000.00 executed by a Surety Company authorized to do business in this State and further provides "if the applicant for a license under this Section be a natural person or a **domestic corporation**, the Board may, if satisfied from an investigation of the financial condition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors, exempt for such time or period as it may deem advisable such person or corporation, by order from the provisions of this section requiring the filing of a bond."

In my opinion, the words "domestic corporations" as used in the Act mean corporations under the law of the State of Alabama and a corporation not incorporated under the laws of this State is not a domestic corporation within the meaning of said Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 21, 1937

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County
Birmingham, Alabama.

Automobile License Tags—Automobile purchased prior to April 1st may pay license on monthly declining basis. Automobile truck purchased prior to April 1, 1937 and not used on highway until April 1, 1937 entitled to pay one-half yearly license, plus \$1.00. Truck purchased after April 1, 1937 may purchase license on monthly declining basis.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 16, 1937, in which you request my opinion as follows:

"I have a copy of your opinion rendered to Judge Hill under date of Feb. 26th in regard to schedule 168 in reference to new and used automobiles etc.

"There are several points that are not clear in regard to cars coming into this state from other states. If a person brought a car into this state from Georgia with a 1937 tag on it which car had been purchased by him prior to the 1st of April and after the 15th day of November would he be entitled to pay on a monthly declining basis or half-year plus \$1.00.

"The same question arises in regard to trucks. All persons buying trucks in the past few months have been required to pay full year license. If a person purchased truck in March and does not use same until after April 1st and makes application for license tag would he be entitled to pay half-year license or on monthly basis as of March or a whole year in view of the fact that he purchased or acquired the truck in the month of March."

Your first inquiry is as to an automobile purchased prior to the first of April and after the 15th day of November, but brought into this State from Georgia. In my opinion, the provisions of Schedule 158.1, as amended by Act No. 67, Extra Session of 1936-1937, would be applicable to an automobile either new or used, acquired subsequent to November 15th, whether said automobile was bought in Georgia or in Alabama. The provisions of Schedule 158.13 providing for the payment of one-half of the year's license plus \$1.00 apply only where the automobile is brought into the State on or after April 1st or is not used or operated between October 1st through March 31st.

Schedule 158.13 providing for one-half of the license plus \$1.00 applies also to a truck purchased in March and not used until after April 1st. Prior to April 1, 1937, such applicant could have been required to pay only a half year license plus \$1.00. However, on February 12, 1937 there was approved Act No. 93 (H. B. 42) Extra Session 1936-1937, which provides as follows:

"Section 1. That Schedule 158.5 of Chapter 6, Article 13 of an act entitled 'An Act to provide for the general revenue of the State of Alabama, approved July 10, 1935, be, and the same is hereby amended so as to read as follows: Schedule 158.5. For each motor truck the following license based on the manufacturer's rated capacity stamped on the truck shall be charged: Truck using exclusively motor fuel on which the excise tax imposed by this State has been paid or motor fuel which will be included in the report required to be made to the State Tax Commission of motor fuel sold or stored and on which the State excise tax on motor fuel will be paid when same becomes due: (a) Trucks less than one ton, Fifteen Dollars, (\$15.00); (b) Trucks of one ton and less than two tons, Twenty Two Dollars and Fifty cents-(\$22.50) (c) Trucks of two tons and less than three tons, Fifty Dollars-(\$50.00) (d) Trucks of three tons and less than four tons, One Hundred Dollars-(\$100.00) (e) Trucks of four tons and less than five tons, Two Hundred Dollars-(\$200.00) (f) Trucks of five tons and less than six tons, Four Hundred

Dollars-(\$400.00) Provided, However, except for trucks purchased prior to November 15th of any tax year that the licenses called for under this schedule shall be purchased on a monthly declining basis of one-twelfth (1/12th) or for each month of the tax year, and that the purchaser shall only buy a license for the then remaining month of the tax year. In figuring the license on a one-twelfth (1/12) reduction for each month, the amount of any fraction shall be figured to the nearest ten cents (10c) above the fraction thereof; "provided further, that the purchaser of a motor truck purchased after November 15th of any tax year shall have such time to purchase the license called for hereunder as may be prescribed by rules and regulations affecting the purchase of said license promulgated by the State Tax Commission."

"Section 2. This Act shall become effective April 1st, 1937."

This Act extends to trucks the monthly declining basis previously applicable only to automobiles. After April 1st, 1937, the effective date of this Act, such truck license tag may therefore be purchased on monthly declining basis.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 21, 1937

Hon. W. L. Hobbs,
Clerk, Russell County,
Phenix City, Alabama.

1. The five per cent commission allowed Solicitors as a fee on forfeitures should be taxed as costs and added to the amount of the judgment forfeiture.

2. A commission on a judgment or forfeiture is allowed the Sheriff as on civil judgments.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of November 3, 1936, which I quote as follows:

"At the last term (October, 1936) of Circuit Court four bonds totaling \$1,300.00 were forfeited against a single defendant and sureties. Execution for the amount of the bonds plus 5% for Solicitor's fee and Sheriff's fee as provided under Sections 3738-3741 as same relates to fees of Sheriffs and Solicitors were issued.

"Kindly advise if this execution was issued properly or should it have been issued for only the amount of the bonds, and if for only the amount of the bonds can I pay court costs for the amount collected."

According to a ruling of this office made on August 5, 1929, Biennial Report, 1928-1930, page 563, to the Chief Examiner, Department of Examiners of Accounts, you are correct in adding to the judgment on forfeiture the five per cent taxable as a Solicitor's fee on commission. I quote from this opinion as follows:

"Solicitors' fees and commissions are to be taxed and collected as other costs, which shows plainly to my mind that the fees and commissions of Solicitors are regarded as costs. Section 3738 Code of 1923."

With reference to the right of the Sheriff to collect a commission on the amount of the judgment, I refer you to an opinion of this office, dated April 25, 1931, Biennial Report of the Attorney General, 1930-32, page 243, from which I quote as follows:

"It is true this Section is found under Schedule of Fees in the Civil Code, Volume 3, and it is true that forfeiture has grown out of criminal process, but in construing this matter we must remember that as soon as a conviction is had or a judgment is confessed or a forfeiture is taken, the enforcement of such judgment, or confession, or forfeiture becomes a civil matter and the collection of the same is, likewise, a civil procedure and the fees in such matters are regulated by law pertaining to civil procedure."

According to the opinions issued from this office, you were correct in issuing an execution on final judgment of forfeiture by which the fees of the Solicitor may be collected in addition to the amount of judgment on forfeiture. The Sheriff collects his own commissions without inclusion in execution as in civil executions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

April 21, 1937

Hon. G. W. Robertson,
Judge of Probate
Baldwin County
Bay Minette, Alabama.

Filing Tax—Deed given to correct error in description of land conveyed in another deed of record upon which lawful filing tax has been paid is not subject to filing tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which I quote as follows:

"This office frequently has the question come up as to whether or not deeds designed to correct errors in description are subject to the filing tax. To propound a hypothetical case, suppose A deeds to B the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ sec. 24, t7s r6e, whereas he intended to convey to him the same subdivision of sec. 23. The intent of both parties was to make the section number 23, but in drawing the deed, the attorney made a mistake in the section number. In the correction deed no actually different land is conveyed but only a correction of an error. Both parties were under the impression, at the time of executing and filing the original deed, that they were conveying the correct lands, and they paid the deed tax in good faith on such a transaction. Would it, therefore, in your opinion be within the intent and meaning of the Statute for a deed tax to be

collected upon the Correction deed, provided the true purport and intent of it was expressed therein?

"I will very much appreciate your advising me upon this point. Several former decisions of former Attorney Generals seem to partially cover the point in question but not with sufficient clarity and latitude to entirely fit the case. The trend of these decisions lead one to believe that perhaps a nominal or minimum tax should attach, but there is likewise an element of question as to whether or not any tax should really be collected. Several local attorneys seem to think not."

If the deed mentioned in your letter is given strictly for the purpose of correcting the description of land conveyed in another deed and the former deed is of record with all lawful filing tax thereon paid, it is my opinion that no additional filing tax on the second deed should be collected. This office held in an opinion to the Honorable M. W. Forman, Judge of Probate, St. Clair County, Ashland, Alabama that a mortgage tax need not be paid on a mortgage given to correct the description in a prior mortgage.

It is further my opinion that when lawful filing tax on the original deed was paid, such payment was intended to cover the filing tax charges on the value of the property now conveyed in the present deed; that the former deed was invalid insofar as it attempted to convey property of the grantors, which was intended to be conveyed. The State of Alabama has already received payment of the filing tax on the value of the land now conveyed and it would amount to double taxation for an additional tax now to be collected on the deed given to correct the error in the former deed. *Long v. Jasper Land Company*, 217 Ala. 593.

Yours very truly,

A. A. CARMICHAEL,
Attorney General

April 21, 1937

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Court of County Commissioners can legally transfer to the Fine and Forfeiture Fund from the County General Fund the amount of solicitor's fees which have been erroneously paid into the General Fund over and above the salary paid the County Solicitor out of the said General Fund.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I have your letter of February 10, 1937, which is as follows:

"Mandamus proceedings were filed in Circuit Court against the County Depository to require them to set over certain monies from the General Fund to the Fine and Forfeiture Fund which funds were alleged to be surplus funds from the Solicitor's Fund over a period of years but which was not placed to the credit of the Solicitor's Fund but placed in the General Fund and the Solicitor's salary paid from the

General Fund. A demurrer to the petition was sustained and thus it stands.

"It is the desire of the Board of Revenue to appropriate \$1,000.00 per year for a period of five years to the Fine and Forfeiture Fund, for the reason that the Fine and Forfeiture Fund is so far behind that there seems to be no hope to redeem outstanding claims from Fines and Forfeitures.

"I present herewith a Resolution which seems to be a compromise between the Board of Revenue and the Petitioners of said lawsuit.

"Please advise me if under this Resolution the Board of Revenue of Houston County would be authorized to make an appropriation from the General Fund to the Fine and Forfeiture Fund."

I am of the opinion that your inquiry should be answered in the affirmative and refer you to the following opinions rendered by this office on the subject:

Biennial Report of Attorney General, 1930-32, p. 447;

Biennial Report of Attorney General, 1930-32, p. 716.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 22, 1937

Hon. Bart B. Chamberlain,
State Solicitor,
Mobile County,
Mobile, Alabama.

Taxation—Act No. 126, approved February 23, 1937.

1. Retailer who sells materials to contractor for erection of school buildings contracted prior to March 1, 1937, with local school boards who use federal grants to pay the contractor, must account to State of Alabama for Sales tax on materials sold to the contractor after March 1, 1937, unless sale was completed prior to March 1, 1937. An incomplete sale is not sufficient to relieve retailer from payment of tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your recent inquiry which I quote as follows:

"Will you kindly give me an opinion on the following question under the Gross Sales Tax Act.

"Assume that a Mobile Wholesale Merchant has a customer who is a contractor and that the contractor has purchased from the merchant at a definite, specific price a considerable quantity of goods to be used in the construction of certain school buildings in one of our interior counties. The wholesale merchant has agreed to sell to the contractor at

definite prices all of said material and the contractor has placed his order with the merchant at said prices for delivery as the jobs on the school buildings progress and the materials are needed. Some of these items may not be delivered for several months. These school buildings are being financed for the most part by federal money grants made to the local boards of school commissioners, and the commissioners put up whatever balance of the amount is needed. The contractor has agreed to construct the buildings for a definite sum of money and in making his contract he relied absolutely on the prices fixed and given him by the merchant and upon which the merchant has agreed to deliver. The contractor cannot increase his contract price and will refuse to pay any sales tax. Is it obligatory upon the merchant under the sales tax act to demand of the contractor a two percent sales tax?"

It is my opinion that the wholesale merchant of your city is responsible under the Chichester Tax Act No. 126 for the payment of the tax on the gross revenue received by him from the sale of materials to the contractor mentioned in your letter, prior to March 1, 1937, and delivery thereof taking place after March 1, 1937, unless such sale is completed prior to March 1, 1937. The wholesale merchant is not relieved from accounting to the State of Alabama for the tax, on a sale which was incomplete on March 1, 1937.

I do not think it would make any difference that the funds received by the county board and used to pay the contractor were grants from the Federal Government. The contractor is in no way a part of the Federal Government nor is he an agent of the Federal Government in erecting the school building. He is an independent contractor and for that reason is in no better position to claim exemption from taxes imposed by the Chichester Act, *supra*, than would be any other person who contracts to erect a school building and receives pay from sources entirely disconnected and disassociated from Federal or State funds.

I invite your attention to a sentence in Section 1 of the Alabama Sales Tax Act which I quote as follows:

"Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold."

The foregoing provision impresses a definite responsibility upon the wholesale merchant to account for the tax on sales of building materials to contractors. The above quoted provision definitely impresses and characterizes such sales as retail sales.

A sale is complete in my judgment only when the contracting parties have reached a mutual agreement as to quality, quantity, price and title thereto has passed.

In order for a title to pass, the goods must be in existence and they must be segregated and set apart as the property of the purchaser, with nothing to be done by either party except to pay the purchase price and deliver the goods. *McCrae vs. Young*, 43 Ala. 622; *Rolfe vs. Huntsville Lumber Company*, 62 So. 537, 8 Ala. App. 487; *Southern States Company vs. Long*, 73 So. 148. If the purchaser could maintain an action of detinue for the property, then the sale may be said to be complete. But could detinue be maintained for materials which are not in existence or which have not been segregated and set apart as the property of the plaintiff? A completed sale is to be distinguished from an incompleting sale. The former supports an action based on title and the latter supports an action seeking damages for breach of con-

tract. Therefore, if the sale is completed after March 1, 1937, it becomes subject to the tax.

It is further my opinion that passage of a law making performance of a contract more burdensome on the contractor does not excuse the whole-sale merchant from collection and remittance of a lawful tax, nor is the passage and adoption of such a tax act any defense to the contractor against payment of the tax to the merchant.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

April 22, 1937

Hon. Haygood Paterson,
Sheriff, Montgomery County,
Montgomery, Alabama.

1. Liquor subject to forfeit under Alabama Beverage Control Act may be confiscated by Sheriff under procedure provided by Section 35 of the Act.
2. Alabama Beverage Control Act does not repeal Code Sections 4654 and 3741 providing for costs, fees and mileage of Sheriff.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 15 in which you request my official opinion as follows:

"One Robert Peek and one Red Edwards were arrested on April 3rd, 1937, on the Mobile Road, public highway, in Montgomery County, Alabama, approximately ten miles from the City of Montgomery, Alabama, by deputy sheriffs from my office for transporting in a Ford V-8 automobile twenty-two cases of whisky and gin upon which there were federal stamps, but no state revenue stamps as required by the Alabama Beverage Control Act. Please advise me specifically what is my duty and what procedure I should follow under the circumstances?

"Without detracting from the generality of the above request would Section 4654 of the Code of Alabama apply should the person or persons be convicted and does Section 3741 in any way apply?

"For your information my office is not on a fee basis but is controlled by a special act, and the fees do not accrue to the Sheriff, but to subdivisions of the government. Your attention is called to the last part of Section 3741 relative to mileage, not with the idea that fees accrue to me, but that the county or the proper subdivisions of the government may have a claim."

In answer to your first inquiry, in my opinion it is your duty to proceed with confiscation of the property seized under the provisions of Sections 33, 34 and 35 of the Alabama Beverage Control Act. The procedure to be followed is set out in Section 35 of said Act and reads as follows:

"Section 35. Procedure When Goods Are Confiscated. In all cases of seizure of any goods, wares, merchandise or other property hereafter made as being subject to forfeiture under provisions of this Act which in the opinion of the officer, or person, making the seizure, are of the appraised value of Fifty (\$50.00) Dollars, or more, the said officer or person shall proceed as follows: First, he shall cause a list containing a particular description of the goods, wares, merchandise or other property seized, to be prepared in duplicate and appraisement thereof to be made by three sworn appraisers to be selected by him, who shall be respectable and disinterested citizens of the State of Alabama, residing within the county wherein the seizure was made. Said list and appraisement shall be properly attested by said officer, or persons, and said appraisers, for which service each of said appraisers shall be allowed the sum of One (\$1.00) Dollar per day, not exceeding two (2) days, to be paid by the Board out of any revenue received by it from the sale of the confiscated goods, or the compromise which may be effected. Second: If the said goods are believed by the officer making the seizure to be of value of less than Fifty (\$50.00) Dollars, no appraisement shall be made. The said officer, or person, shall proceed to post a notice for three (3) weeks in writing at three (3) places in the county where the seizure was made, describing the articles and stating the time and place and cause of their seizure and requiring any person claiming them to appear and make such claim in writing within thirty (30) days from the date of the first posting of such notice. Third: Any person claiming the said goods, wares, or merchandise, or other property so seized as contraband, within the time specified in the notice, may file with the Board a claim in writing, stating his interest in the articles seized, and may execute a bond to the Board in a penal sum equal to double the value of said goods so seized, but in no case shall bond be less than the sum of Two Hundred (\$200.00) Dollars, with sureties to be approved by the clerk of the circuit court in the county in which the goods are seized, conditioned that in the case of condemnation of the articles so seized, the obligors shall pay to the Board the full value of the goods so seized and all costs and expense of the proceedings to obtain such condemnation, including a reasonable attorney's fee. And upon the delivery of such bond to the Board, it shall transmit the same with the duplicate list or description of the goods seized to the solicitor of the circuit court in which such seizure was made, and the said solicitor shall file a bill in the circuit court in equity of the county where the seizure was made to secure the forfeiture of said goods, wares, merchandise or other property. Upon the filing of bonds aforesaid the said goods shall be delivered to the claimant pending the outcome of said case. Provided, however, said goods must have the proper stamps, crowns or lids affixed to each such article of alcoholic beverage enumerated and defined herein before turning same over to claimant, the stamps, crowns or lids so affixed to be paid for by claimant when goods properly stamped are delivered by the Board. Fourth: If no claim is interposed and no bond given within the time above specified, such goods, wares, merchandise or other property shall be forfeited without further proceedings and the same shall be sold as herein provided. And the proceeds of sale when received by the Board shall be turned in to the State Treasury as other revenues collected by said Board. Provided, that in seizure in quantities of less value than Fifty (\$50.00) Dollars, the same may be advertised with other quantities at Montgomery, Alabama, by the Board and disposed of as hereinabove provided. The proceedings against goods, wares, merchandise, or other property, pursuant to the provisions of this Act, shall be considered as proceedings in rem unless otherwise herein pro-

vided. Provided, however, should the Board have to resort to the Courts for collection of the tax due and assessed, no advertisement shall be made and the confiscated alcoholic beverages enumerated and defined herein may be held as evidence pending the results of Court action."

This section is self-explanatory and I believe you will have no trouble following the procedure there provided. I call your attention also to Section 36 which provides that the Beverage Control Board may, in its discretion, return any goods confiscated under the Act when it is shown that there was no intention to violate the provisions of the Act. Until formal notice of such compromise or return is given to you you should proceed with confiscation as provided by Section 35.

Your next inquiry is as to whether Code Sections 4654 and 3741 apply under the facts set out in your letter. Code Section 4654 provides for the taxing against the defendant of certain fees for an officer arresting any person in possession of prohibited liquors. The applicable part of Section 3741 provides that when a sheriff captures or arrests a defendant with contraband or prohibited liquors or beverages either with or without warrant that it shall be taxed in favor of the sheriff against the defendant on conviction. In addition to other fees and charges allowed by law, the sum of ten cents per mile each way from the courthouse to the place of arrest and all expenses for the transportation of the contraband or prohibited liquors or beverages from the place of arrest to the courthouse.

In my opinion, both of these sections are applicable. Section 61 of the Beverage Control Act repeals all laws or parts of laws in conflict with the Act but provides, "Provided nothing herein contained shall be construed as repealing * * * any law now fixing fees to officials for the enforcement of any and all laws, including this Act, but the same shall remain in full force and effect." In my opinion, therefore, the Beverage Control Act does not repeal the sections providing for costs and fees, but such costs and fees should be collected for the benefit of the proper governmental subdivision in the same manner as provided prior to the passage of the Beverage Control Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

April 23, 1937

Honorable H. D. Weathers,
Superintendent of Education
Conecuh County
Evergreen, Alabama.

1. Fines and Forfeitures—Fines and Forfeitures imposed for violation of General Acts of 1935, page 240, held payable to County Fine and Forfeiture Fund.

2. Acts of 1932, page 216, held unconstitutional and void.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 29, 1937 in which you request my opinion as follows:

"A Justice of Peace in this county recently fined a truck driver for passing a school bus while it was unloading school children. The Justice of Peace would like to know to whom he is to pay this fine.

"In a school code that he has, bearing the date of 1932, it says that the fine is to be paid to the county board of education. In a pamphlet giving the rules governing the highways of Alabama, it states that such fines should be forwarded to the State Highway Department. This seems to be contradictory. Please let me know the proper disposal of this fine."

In reply I wish to advise you in my opinion the Acts of 1932, page 216, Act No. 215, to which you refer as appearing in the School Code under date of 1932, is unconstitutional and void. I wish to refer you to an opinion of the Attorney General, Volume 12, page 308, office edition, under date of December 10, 1932, so holding.

I wish to refer you to Acts of 1935, page 240, Senate Bill 174, Mooneyham, which Act provides in part as follows:

"Section 1. That every person using, operating or driving a motor vehicle upon or over the roads and highways of the State of Alabama shall, when approaching a school bus, or other vehicle engaged in transporting school children, bring said motor vehicle to a complete stop, while said school bus, or other vehicle used in transporting school children, is engaged in taking on or discharging school children.

"Section 2. That any person violating this Act shall upon conviction be punished by a fine not to exceed three hundred (\$300.00) dollars, or by imprisonment in the County jail not to exceed ninety (90) days, or both, at the discretion of the Court."

In my opinion, the fine in this case, should have been imposed under the terms of the above quoted 1935 Act and remittance made to the Fine and Forfeiture Fund of the County. I refer you to Sections 4038, Mitchie's Code of 1928 and authorities cited thereunder, which provides for the disposition of fines when the Act of the Legislature imposing the fine makes no provision for the disposition of the fine for the violation of the terms of the Act itself.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

April 23, 1937

Honorable C. E. McNatt,
Circuit Clerk,
Franklin County,
Russellville, Alabama.

Fines and Forfeitures—

Fines imposed for violation of General Acts, 1935, page 240, should be paid to the County Fine and Forfeiture Fund.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 12, 1937 in which you request my opinion as follows:

"A person is tried on an affidavit or complaint containing two counts. The first count of the affidavit charges that the defendant violated Senate Bill 174 as shown in the General Acts of 1935, page 240, by driving a motor vehicle upon a road or highway and failing to come to a complete stop when approaching a school bus taking on or discharging school children. The second count of the affidavit charges the defendant with reckless driving in violation of Section 49 of the Highway Code of Alabama shown in the General Acts of 1927, page 365.

"The jury found the defendant guilty as charged in the first count of the affidavit of failing to stop his vehicle when approaching a school bus taking on or discharging school children, and fixed his fine at \$25.00.

"Please advise me if the \$25.00 fine should be paid into the fine and forfeiture fund of the county or to the State Highway Department? Please advise me to whom I should pay the \$25.00 fine."

In my opinion the fines imposed for the violation of the General Acts 1935, page 240, should be remitted to the County Treasurer to be deposited in the County Fine and Forfeiture Fund.

I call your attention to the fact that the above named statute (General Acts 1935, page 240) makes no definite provision for the disposition of fines collected for violation of its provisions.

Section 4038 of Michie's Code of 1928, provides as follows:

"Section 4038. Fines to go to county, and judgment accordingly.—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the State, for the use of the particular county." See also authorities cited under the above quoted Code Section.

Premises considered, it is my opinion that fines here considered should be paid into the County Fine and Forfeiture Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

April 27, 1937

Hon. W. L. Hobbs,
Clerk and Register,
Russell County,
Phenix City, Alabama.

1. Fines and Forfeitures—Collected under the terms of H. B. 212—Britton, approved February 1, 1937, for violations of highway laws, held payable to State Treasurer.

2. Trial Tax—Trial tax provided for in H. B. 212—Britton, payable to County Court Fund, according to terms of said H. B. 212—Britton.

3. Solicitors' fees—Solicitors' fees collected under terms of H. B. 212—Britton, approved February 1, 1937, held payable to County Court Fund.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 9, 1937, in which you request my opinion as follows:

"The Local Law creating the County Court of Russell County recently enacted by the present Legislature provides that all fines, solicitors' fees, and trial tax be deposited in the County Court Fund, and at the end of the year after the expenses of the County Court have been paid from the said County Court Fund, that the balance, if any, in the County Court Fund shall be transferred to the General Fund of the County.

"This appearing to be in conflict with the General Law, please furnish official opinion as to whether I shall make remittances of fines collected for violations of the State Highway Law to the State Highway Patrol Fund? and remittances of solicitors fees collected to the State Treasurer? and trial tax divided equally between the State Treasurer and the County Treasurer?"

In reply I wish to advise you that in my opinion you should remit fines and forfeitures collected for violation of the Highway Laws, to the State Treasurer. I wish to refer you to the General Acts of 1935, page 759 as amended by General Acts of 1936, page 166, which provides in part as follows:

"Section 8. * * * Fines and Forfeitures imposed upon persons violating provisions of this Act shall be rendered into the Highway Patrol Fund by the officers of the several Courts * * *

"Section 9. The State Highway Commission, with the approval of the Governor, shall establish and promulgate reasonable rules and regulations concerning the operation of motor vehicles upon the highways of this State; and concerning the enforcement of the provisions of this Act."

I wish to further refer you to General Acts of 1927, page 390, which provides in part as follows:

"Section 106. Fines and Forfeitures. All fines and forfeitures collected upon conviction or upon forfeiture of bail of any person charged with a violation of any of the provisions of this Article constituting a misdemeanor, shall be within thirty days after such fine, or forfeiture is collected, forwarded to the State Treasurer."

In my opinion the above quoted provisions of law constitute specific legislation upon a specific subject for a specific purpose. The terms of your Local Act, H. B. 212—Britton, in my opinion are entirely general. Section 8, of H. B. 212—Britton, approved February 1, 1937, provides as follows:

"Section 8. That all fines, penalties and forfeitures imposed by said Court, Solicitors' fees and trial tax shall be collected by the Clerk and paid into the Depository of the County, and shall constitute a fund

known as 'County Court Fund', and shall be kept separate from all other County Funds."

In my judgment, provisions of Section 8, H. B. 212—Britton, above quoted, do not repeal the provisions of the law governing the Highway Patrol and violations of highway laws in general as referred to *supra*.

It is my opinion that when a specific subject has been specifically provided for by definite legislation for a specific purpose, such legislation is not repealed by the subsequent enactment of legislation in general terms, although the general subject may include the specific subject.

I wish to refer you to the case of **City of Birmingham v. Southern Express Company**, 51 So. 159, 164 Ala. 529, in which the Courts said: "Where a specific subject has been explicitly provided for by law, it is not considered repealed by a subsequent law dealing with a general subject in a general way, though the specific subject may be included in the general subject."

I wish further to refer you to the case of the **City of Mobile v. Mobile Electric Company**, 84 So. 816, 203 Ala. 574, in which the Court said:

"Special provisions relating to special subjects control general provisions relating to general subjects. The thing specially treated will be considered as exception to the general provision. When a special subject has been specially provided for by law, it will not be considered as repealed by a subsequent law which deals with a general subject in a general way though the specific subject and a special provision may be included in the general subject and the general provision. 7 Mayfield's Dig. 850, and many cases there cited."

I wish to further refer you to **Fuqua v. City of Mobile**, 121 So. 693, 23 Ala. App. 74, Rev. (1928) 121 So. 696, 217 Ala. 1, Certorari denied, 121 So. 697, 219 Ala. 3; see also **Scottish Union & National Insurance Company v. Baker**, 84 So. 480, 17 Ala. App. 188, Certorari denied; **Ex parte Baker**, 84 So. 924, 203 Ala. 696.

You inquire further concerning the disposition of trial tax collected on case tried by the County Court of Russell County as provided for in H. B. 212, Britton. I call your attention to Section 14 of said H. B. 212, Britton, which provides as follows:

"That a trial tax of \$3.00 shall be assessed and collected by the clerk in all cases."

It is my opinion that the trial tax where provided for is peculiar to this court and is not the same trial tax as provided for in the Revenue Code of 1935, Section 9, Article 1.

You will note that the trial tax provided for by the Revenue Law applies in the Circuit Court only. The tax assessed under the provision of H. B. 212, Britton, *supra*, is peculiar to the County Court of Russell County and its disposition is determined by the terms of the said H. B. 212, Britton, as provided for in Section 8 thereof.

I am not required by your request to pass upon the constitutional validity of H. B. 212, Britton or any of its parts. I, therefore, at this time, do not pass upon the question of the validity of Section 14 of your local act, and its relationship to Section 96 of the Constitution.

We come now to a consideration of your question concerning disposition of solicitors' fees under the provisions of H. B. 212, Britton, approved February 1, 1937.

It is my opinion that the provisions of House Bill 212, Britton, supra, control remittances of solicitors' fees of the County Court of Russell County and said fees are payable to the County Fund, provided for by H. B. 212, Britton, approved February 1, 1937.

"For every conviction of a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitors' fees provided for convictions in such cases in the circuit court; and said fees shall be placed in the solicitors' fund of such county by the treasurer of said county; and on appeal to the circuit court, the same shall be taxed as a part of the costs in addition to the solicitors' fee taxed for such conviction in the circuit court, and this solicitors' fee previously taxed in the county court or inferior court, shall be paid, when collected, into the county treasury, and placed in the solicitors' fund of such county by the treasurer of said county."

It is my opinion that the provisions of H. B. 212, Britton, supra, simply provide for a different disposition of solicitors' fees from that provided for by the general law and since the County Court established by H. B. 212, Britton, supra, is in lieu of County Courts provided for by general law, the solicitors' fees collected under the terms of said H. B. 212, Britton, should be paid in accordance with the mandates of Section 8 of said H. B. 212, Britton, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. R. A. Leath,
Sheriff, Etowah County,
Gadsden, Alabama.

Sheriffs—Board of Revenue of Etowah County required to furnish sheriff with necessary stove wood for heating jail but not for preparing meals of prisoners.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letters of recent date in which you ask my opinion as to the effect of Local Act of 1931, page 276, as follows:

"Under this Local Act, am I authorized to make out requisition for stove wood used in the jail. Does this Local Act cover stove wood used in heating and cooking in the jail of Etowah?"

In my opinion you are authorized to make out requisition for stove wood used for heating the jail. This expense is an expense incident to the maintenance of the jail and under Code Section 4878 should be paid out of the funds of the County.

It is my opinion that the Board of Revenue of the County is not required to furnish you with necessary stove wood for preparing meals for prisoners. *Holcombe v. Mobile County*, 229 Ala. 77, 155 So. 639, Cert. Den. 229 Ala. 77, 155 So. 640.

In my opinion the Local Act above cited does not change the law as to expense of preparing or serving food. This Local Act requires that the Board of Revenue shall act as purchasing agent for the various county officials but there is nothing in the terms of that Local Act purporting to increase the obligations of the County insofar as furnishing wood for preparing food for prisoners.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. D. E. Laslie,
Judge of Probate,
Macon County,
Tuskegee, Alabama.

Uniform Veterans Guardianship Act.

Guardians appointed under Uniform Veterans Guardianship Act not entitled to commission on bonds received in exchange for Adjusted Service Certificate.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"1. Under the Uniform Veterans Guardianship Act, 'A' is guardian of 'B'. 'B' had an Adjusted Service Certificate. 'A' made application for bonds on the Certificate which he has received. As such guardian is he entitled to commission on the amount of bond? If so, how much?

"2. The Bank of Tuskegee was guardian for 'B'. The bank closed and 'A' is the succeeding guardian. An Adjusted Service Certificate was among the assets received by 'A' as the succeeding guardian from the Bank of Tuskegee. 'A' made application for the bonds on the Adjusted Service Certificate and has received the same. Is he entitled to commission on the bonds, and, if so, how much? The Bank of Tuskegee, of course, never received any commission on the Adjusted Service Certificate."

In answer to both of your questions, I am of the opinion that "A", the guardian, may not receive commission on the bonds received in exchange for Adjusted Service Certificate. Under Section 11 of the Uniform Veterans Guardianship Act (Section 8134 (11) Michie's 1936 Supplement to the Code of Alabama) compensation payable to the guardian is limited to 5% of the income of the ward. In my opinion, the proceeds of an Adjusted Service Certificate are part of the corpus of the estate and not income. *Gilbert v.*

Hines, 32 S. W. (2d) p. 76. No compensation, therefore, is payable on such an amount.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. Chas. W. Lee,
State Comptroller
CAPITOL.

Elections—Expenses of liquor election held March 10, 1937, paid by State from General Fund.

(a) Cost of preparing list of qualified electors furnished election officials held expense of election.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 12, 1937, in which you request my opinion as follows:

"Section 51 of the Alabama Beverage Control Act says in substance, the following, viz:

"—Said election shall be held on the 10th day of March, 1937, and shall be held and Officers appointed in the manner provided by law for general election. All of the expenses of said election shall be paid by the State, and the returns from said election shall be tabulated etc.—"

"Please advise us if we are to pay the costs incurred in said election held March 10, 1937, from the receipts and revenues of the Alabama Beverage Control Board, obtained from the sale of beverages etc."

As stated in your letter, Section 51 of the Alabama Beverage Control Act, passed February 2, 1937, provides that "all the expenses of said election shall be paid by the State." In my opinion, this statement means that the expenses shall be paid from the General Fund of the State. Cf: **Weaves v. Tidwell**, 228 Ala. 169, 153 So. 218.

Section, 53 of the Act which provides that:

"The sum of \$250,000, or so much thereof as may be necessary, is hereby appropriated out of the General Fund of the State Treasury and to be used by the Board in defraying any expenses which may be incurred in the administration, and in preparing to administer this Act before sufficient funds shall have been collected from licenses, taxes and earnings as hereinbefore provided,"

does not authorize the State of Alabama to pay for the expenses of the election out of this \$250,000, inasmuch as the purposes for which this appropriation is to be used are clearly set forth, i. e., for defraying the expenses incurred in the administration and in preparing to administer the Act. The election held on March 10th is not, in my opinion, one of the incidents of the administration of the Act.

An opinion rendered to Hon. John S. Golson, Probate Judge, Butler County, Greenville, Alabama, under date of February 20, 1937, held that the Probate Judge might employ such clerical assistants for the preparation of the voters list for the election to be held on March 10, 1937, as might be necessary, "the same to be paid as provided by Act No. 251, Acts of 1931, page 293." It is my judgment that the foregoing quotation applies only to the nature and amount of the expenditures and not to the source from which they are to be paid. The source here is, as stated above, the General Fund of the State of Alabama. The expense alluded to in the Golson opinion is part of the expense of the election in question to be paid from the General Fund of the State. (See opinion to Chairman, County Commissioners, Russell County, under date of February 12, 1935 as modified by Attorney General's Quarterly Report, Volume 3, page 109).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. Eugene E. Waldrep,
Representative, Franklin County,
Red Bay, Alabama.

1. Life Insurance Company may make reasonable discrimination in rates between policies containing permanent and total disability clause and policies without such clause, under Code Section 4604.

2. Notice tending to induce person to lapse, forfeit or surrender benefits is a violation of Code Section 4601 if such notice is a misrepresentation.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your recent letter in which you request my opinion as follows:

"Your opinion on the following is respectfully requested.

"The following notice has been sent by a Mutual Life Insurance Company qualified to do business in this State, to its policy holders in Alabama, who hold policies containing a provision for disability income benefits;

"Policies which contain a provision for an income in event of total and permanent disability now earn less surplus than policies otherwise similar which do not contain such a provision. The dividends on policies containing such provisions are therefore less than for otherwise similar policies without such provisions.

"If desired, such provisions can be cancelled on the approaching policy anniversary, and, therefore, the premium payable will be lower, and future dividends will be on the scale applicable to policies without such provisions."

"Question No. 1. Do the provisions of the above notice constitute a violation of Section 4604 of the Code of Alabama of 1923 or any other law of this State relating to mutual life insurance companies?"

"Question No. 2. Does this provision as quoted in the above notice constitute an inducement to forfeit, lapse or surrender such benefits as are described or referred to therein in violation of any law in Alabama?"

Your first question should be answered in the negative except as qualified in the answer to your second question. The provisions of Section 4604 of the Code of Alabama allow a Life Insurance Company to make a distinction or discrimination between insurants of different classes. From the facts set out in your letter, it appears that the distinction or discrimination is between that class of policyholders whose policies provide for permanent and total disability as distinguished from those policies without such provisions. In my opinion this is a reasonable distinction between the two classes which would entitle the Insurance Company to charge different rates therefor.

In my opinion, the provision as quoted clearly constitutes an inducement to forfeit, lapse or surrender the benefits referred to therein. Whether this is a violation of the law of Alabama depends entirely upon the truth of the facts set out in the notice. Code Section 4601 provides:

"4601. Unlawful to issue statement misrepresenting terms of any policy, etc.—No life insurance company doing business in this state, and no officer, director or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof, Nor shall any such company, agent or broker make any misrepresentation to any person insured in such company or in any other company for the purpose of inducing or tending to induce any person to lapse, forfeit or surrender his insurance."

If the facts set out in the notice are not true, in my opinion the notice would constitute a misrepresentation for the purpose of tending to induce policyholders to lapse, forfeit or surrender their benefits within the meaning of this statute.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. Eugene H. Hawkins,
Judge of Probate,
Room 113 Court House,
Birmingham, Alabama.

An additional mortgage tax under Schedule 94, 1935 Acts of Alabama, page 477, should not be paid on instrument executed to indemnify surety of mortgage debt upon which mortgage tax has already been paid.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of inquiry which reads as follows:

"I am enclosing herewith a copy of a mortgage which has been presented for record in this office. Mr. Douglass Wingo, who is handling this transaction, insists that it secures the identical debt as the mortgage to Mrs. Lynn, which has been filed for record in this office, and the mortgage tax paid thereon.

"Please advise me if, in your opinion, a mortgage tax should be collected on this instrument, and if so, on what basis."

I will not undertake to set out haec verba the copy of the mortgage referred to in your letter, but will give a brief statement of the facts which are as follows: A owned one-half interest and B and C owned one-half interest in some real estate, which they jointly mortgaged to one L, said mortgage having been recorded in the Probate Office of Jefferson County, Alabama. Each of the parties signed the note to L, which mortgage secures. B and C have paid off one-half of the debt. The agreement which is enclosed so acknowledges payment of one-half the debt and also acknowledges that the balance is due by A, although B and C are liable therefor under the terms of the original instrument to L. The instrument enclosed in the letter is an agreement by A with B and C to indemnify the latter against payment of the balance of the debt due by A, and said instrument mortgages to B and C the one-half interest of A in the property originally mortgaged to L.

I am of the opinion, and so hold, that no additional mortgage tax should be paid on the instrument which you enclose.

The instrument offered for record does nothing more than incorporate certain lawful rights which already exist to B and C as follows: Should A fail to pay off and discharge the debt, or any part thereof, to L, then B and C, upon payment by them of said obligation, would succeed to the rights of L to foreclose the mortgage on A's half interest. There is no present debt from A to B and C, but only a potential debt which will come into existence when A defaults to L. The instrument in question creates no new debt, in fact, it does nothing more than to embody and simplify a remedy which B and C already have, that is, to have the half interest of A sold for the payment of the debt to L. The debt if any existing now or in the future to B and C, was incorporated in the mortgage to L and upon which a tax has already been paid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. Ellis Burns,
Tax Assessor,
Cullman County,
Cullman, Alabama.

Cullman County—

Associate Members of Board of Finance and Control entitled to receive compensation as Members of Board of Review in addition to that paid them as Members of said Board of Finance and Control.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 19, 1937, which is as follows:

"The question arose as to whether our Board of Finance and Control could or could not receive more than seventy-five dollars per month even while serving as the Board of Review.

"The local law says that they cannot but my understanding is, that this does not cover their duties as the Board of Review, only as Board of Finance and Control. Section Seventy in the new revenue bill says that they shall receive, as members of the Board of Review the same per diem in addition to that as now fixed by law, except where such officials are paid a salary and in this case they are not."

In answer to your inquiry, it is my opinion that the Associate Members of the Board of Finance and Control of Cullman County, holding office under the provisions of Act No. 126, H. B. 241 approved April 14, 1936 (Local Acts 1936, page 70), may receive compensation for sitting as members of the Board of Review in addition to the maximum allowance of seventy-five dollars per month as provided for in Section 15 of said Act.

The Act in question created the Board of Finance and Control of Cullman County, Alabama in lieu of the former Court of County Commissioners. The same duties as hereto were imposed upon the Court of County Commissioners were imposed upon the Board of Finance and Control, in addition to such additional duties provided for in said local Act. The compensation of the Members of said Board of Finance and Control is governed by Section 15 thereof. Said Section provides, in part, as follows:

"Section 15. The Chairman of said Board of Finance and Control shall receive a compensation of \$150.00 monthly; and the associate members shall receive \$5.00 per day for each day's service, not in excess of \$75.00 in any one month. * * *"

Section 70 of the Revenue Act of 1935, provides as follows:

"Section 70. The members of the courts of county commissioners or boards of revenue, or courts of like jurisdiction of the several counties of the State shall receive, as members of the Board of Review, the same per diem and be paid in the same manner as when sitting at a regular term of such court of county commissioners or board of revenue when such compensation is fixed on a per diem basis, which compensation shall be in addition to that as now fixed by law, except in counties where such officials are paid a salary."

It will be seen from the above that the Members of the Court of County Commissioners, or other like governing bodies, while sitting as Members of the Board of Review, are entitled to compensation therefor, in addition to that allowed them as Members of the Court of County Commissioners, or other like governing bodies.

The Board of Finance and Control of Cullman County is the County governing body created in lieu of the Court of County Commissioners of said County. The maximum limitation in Section 15 of the Local Act under consideration, in my opinion, refers to compensation allowed said Members

while acting as Members of said Board of Finance and Control. The limitation, in my judgment, does not apply to that also received while sitting as Members of the Board of Review. This compensation is specifically provided to be additional.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Taxation—License. Section 348, Schedule 123, General Revenue Acts of Alabama, 1935.

Person who operates sawmill on his own land and uses the lumber cut from his own land to repair his own houses and who does not sell any of the lumber to the public is not subject to sawmill license imposed by Schedule 123, supra.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of the 6th inst., which I quote as follows:

“Please advise us if a license is required of a person who operates a sawmill on his own land and uses the lumber cut from timber on his own land for building and repair of houses on his premises, and who does not sell any lumber to the public.”

It is my opinion that the foregoing inquiry should be answered in the negative.

It was not the intention of the legislature that the owner of a sawmill who cuts his own timber and uses the lumber exclusively in the repair of his own buildings, and who does not sell or offer any of the timber for sale to the public, should pay an occupational or privilege license tax on such operations.

In my opinion there is no logical inference to be drawn from the act that the legislature intended to impose a privilege license on a sawmill operator who does not sell or offer to sell the manufactured lumber to the public as a means of a livelihood or as a gainful business or occupation. The Schedule does not require a tax to be paid on strictly private sawmill operations for strictly personal use and consumption.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. C. E. McNatt, Clerk,
Law & Equity Court,
Franklin County,
Russellville, Alabama.

Fine and Forfeiture—

Fine and Forfeitures assessed for violation of Section 49, General Acts of 1927, page 365, held payable to State Treasury.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 12, 1937, in which you request my opinion as follows:

"A person is charged in an affidavit or complaint with the offense of reckless driving of a vehicle as charged in Section 49 of the Highway Code of Alabama as shown by the General Acts of 1927, page 365. Said person, with the consent of the Court, pleaded guilty to an attempt to commit the offense of reckless driving of a vehicle upon a highway and the court fixed his fine at \$5.00. Should this fine be paid into the fine and forfeiture fund of the county or should the fine be paid to the State Highway Department? To whom should this \$5.00 fine be paid?"

In reply I wish to advise you that in my opinion fines imposed for reckless driving, under the provisions of the General Acts of 1927, page 365, Section 49, should be forwarded to the State Treasurer.

I call your attention to Section 106, General Acts of 1927, page 390, which provides for the disposition for fines and forfeitures of this nature in part as follows:

"Section 106. FINES AND FORFEITURES. All fines and forfeitures collected upon conviction or upon conviction of bail of any person charged with a violation of any of the provisions of this Article constituting a misdemeanor, shall be within thirty days after such fine or forfeiture is collected forwarded to the State Treasurer."

I note that you ask specifically concerning a fine of five dollars assessed by a Court upon "an attempt to commit the offense of reckless driving of a vehicle upon a highway."

In my opinion there is no authority of law for the assesment of a fine for an attempt to commit the offense of reckless driving of the vehicle upon the highway. I presume that the Court in assessing this fine intended to follow the provisions of Section 3307, Code of the Alabama, 1923, which provides as follows:

"Section 3307. Jury may find the attempt.—Upon the trial of an indictment for any offense, the jury may find the accused not guilty of the offense, charged in the indictment, but, if the evidence warrants it, guilty of an attempt to commit such offense, without any special count in the indictment for such attempt."

You will note that the law as stated in the above quoted Section authorizes a jury upon the trial of an **indictment** to find that the offense charged in the **indictment** was not committed, but if the evidence warrants it, the defendant may be found guilty of an attempt to commit such an offense. I do not know of any authority of law authorizing the court to find a defendant

guilty of an attempt to commit the offense of reckless driving a vehicle upon a highway. See **Hutto v. State**, 169 Ala. 19 and authorities cited therein. In my judgment a five dollar fine here set is clearly unwarranted.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. Roy Johnson, Tax Assessor,
Room 106 Court House,
Jefferson County,
Birmingham, Alabama.

Act No. 107—Special Session 1936-1937—Homestead Exemptions.

1. Person authorized to claim homestead exemption under Act 107, supra, may assert said exemption in real property, acquired under lease sale contract (as described in opinion), fee simple title in claimant not being necessary.

2. Person holding beneficial interest in real property acquired under lease sale contract (as described in opinion) is lawfully authorized to assess said real property for taxes.

Opinion by Assistant Attorney General Simmons:

Dear Sir:

I have your inquiry which I quote as follows:

"The Metropolitan Life Insurance Company of Birmingham has sold hundreds of pieces of property in the Birmingham district on lease sale contract. As the title still reposes in the insurance company, the purchaser under lease sale contract, it would seem, would not be entitled to a tax-exemption as a homestead. In other words, the legal title of the property not being in the name of the purchasing party, and not assessed by them, there should be no homestead exemption.

"Will you please advise me if I am correct in the statement and also I would like an opinion as to whether or not parties purchasing on a lease sale contract would have authority to assess said property in their name? It seems to me that this is clearly set out but many of the big mortgage companies and insurance companies have requested that I get a written opinion from you that they may show their property-owners."

You state in your letter that the property was sold under a lease sale contract, but you failed to attach a copy of said contract. I will assume for the purpose of this opinion, that the purchaser leased the property for a term of years agreeing to make periodical payments with the further agreement that if the purchaser keeps up the payments during the term, then the amount so paid shall be treated as the purchase price of the property, otherwise, in case of default, the amount so paid shall be treated as rent. I assume further, the lessor in the contract agrees to execute and deliver a proper conveyance of title when and as all the installments have been paid.

If the assumptions I have made in the preceding paragraph are correct, then it is my opinion that the lessee in said lease sale contract is entitled to pursue homestead exemptions under Act 107, supra, reading as follows:

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and Laws of the State of Alabama.

"Section 2. Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937."

"Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars (\$2,000.00) in assessed value, nor one hundred sixty (160) acres in area."

Section 1 of the aforementioned Act 107, defines the homestead as one defined by the Constitution and Laws of the State of Alabama. I quote Section 7882, Code of Alabama, 1923, as follows:

"Section 7882—Homestead Exemption—the homestead of every resident of this state, with the improvements and appurtenances, not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be, to the extent of any interest he may have therein, whether a fee or less estate, or whether held in common or in severalty, exempt from levy and sale under execution or other process for the collection of debts during his life and occupancy, and if he leave surviving him a widow and a minor child, or children, or either, during the life of the widow and minority of the child or children; but the area of the homestead shall not be enlarged by reason of any incumbrance thereon, or of the character of the estate or interest owned therein by him."

A resident of Alabama is entitled to homestead exemptions even though his estate in the property is less than fee. The Supreme Court of Alabama has rendered several opinions on the subject and has held that a resident does not have to own the property in fee simple in order to claim a homestead exemption. I quote several headnotes of decisions as follows:

"Under a law exempting the homestead owned by the head of a family, an exemption may be asserted in property occupied as a homestead, though the debtor has not an estate in fee, since the exemption is not dependent on the estate or interest in the land, but because it is the dwelling place of the debtor. *Tyler v. Jewett*, 2 So. 905, 82 Ala. 93."

"Under the constitutional and statutory provisions, a homestead exemption may be claimed in lands which are occupied and constitute the dwelling place of the family without regard to the nature or character of the title,—whether in fee simple, for life, or for years only. *Steiner v. Berney*, 30 So. 570 130 Ala. 289."

"Under Code 1907, Section 4160, the head of a family has a homestead in land upon which he entered under a contract of purchase, and on which he made his home.—*Burrow v. Clifton*, 65 So. 58, 186 Ala. 297."

"Nature of title to homestead is immaterial.—*Booker v. Booker*, 125 So. 212, 220 Ala. 367."

"Any interest resident of state has in lands can be claimed to be exempt from execution as homestead (Code 1923, Section 7882).—*Murphy v. Vaughan*, 147 So. 404, 226 Ala. 461."

It is to be observed from the foregoing authorities that ownership of the property in fee simple is not an absolute condition for one to assert homestead rights. A beneficial interest in the land is sufficient.

It is my opinion that a person who has purchased on a lease sale contract, the contents of which I have in this opinion assumed to be true, may assess such property for taxation. A person owning a beneficial interest in property may not only assess the interest for taxation, but he is required to do so. I refer you to the General Revenue Acts of Alabama, 1935, Section 31, as amended, Special Session of the Legislature, 1936, page 4, by which I quote as follows:

"It is the duty of every person in every election precinct to attend in person before the Assessor on the first day of the appointment in the precinct of the taxpayer's residence, and then and there render to the Assessor under oath a full and complete list of all property of which he was owner, **or in which he had any interest whatever**, or of which he was trustee or agent on the first day of October of that year, and to enter upon such paper the amount of fire insurance carried upon any of the property so listed."

I think the aforementioned quoted provision clearly authorizes any person owning a beneficial interest in lands under a lease sale contract, as mentioned in your letter, to assess the **property** described therein for taxes. *State v. White Furniture Company*, 206 Ala. 575; 90 So. 896; *Crow, Tax Collector, v. Outlaw*, 225 Ala. 656, 145 So. 133.

This opinion should not be construed as authorizing exemptions from payment of taxes on homesteads for the tax year 1936-1937, due October 1, 1937.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. R. J. Goode, Commissioner,
Agriculture & Industries,
State Capitol,
Montgomery, Alabama.

Licenses—License fee required by Act No. 190, H. B. 106, approved April 21, 1936 (General Acts 1936, p. 222) is an occupational license and the Veterans' Exemption Act (Acts, 1935, p. 1057) is applicable thereto.

Opinion by Assistant Attorney General Screws:

Dear Sir:

I have your letter of January 5, 1937, which is as follows:

"I hand you herewith a copy of an Act approved April 21, 1936, being Governor's No. 190 and House 106-Hare. This Department has received an application under this Act for the required license accompanied by a certificate that the applicant, William L. Cherry, Plantersville, Alabama, is 25 per cent disabled as a World War veteran and is,

therefore, entitled to a \$25.00 exemption from State, county and city license. This Department has held that this is not a revenue license but an inspection fee and is not, therefore, subject to the exemption in question.

"I request an official opinion from your office on this point."

In answer to your inquiry, I am of the opinion that the license fee in question is an occupational license and the Veterans' Exemption Act (Acts, 1935, p. 1057) is applicable thereto.

The Act under consideration levies license of \$5.00 on dealers in livestock. Said \$5.00 is designated as "a fee for such license". Said Act further provides that no dealer in livestock can engage in such a business without the payment of said fee. It further provides criminal prosecution for the failure to secure said license fee before engaging in the business under consideration. Such fee, in my judgment, is clearly an occupational license the same as any other occupational license.

Since the fee in question is a license fee on occupation on dealers in livestock, a disabled veteran who comes within the provisions of the Veterans' Act (Acts 1935, p. 1057) is entitled to the exemptions allowed in said Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 27, 1937

Hon. P. C. Black,
Judge of Probate,
Geneva County,
Geneva, Alabama.

County Commissioners—Section 21 of H. B. 179, Special Session of the Legislature 1936-37. How money appropriated may be used.

1. It is mandatory upon the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State to use the proceeds from H. B. 179 exclusively for health service, public welfare, and agricultural extension service.

2. County governing body may use their own discretion in dividing the proceeds of H. B. 179 among the several beneficiaries or agencies designated in Section 21 of said Act, and may shift and re-allocate this fund from one agency to another at their discretion. The Act does not require an equal division.

3. The phrase "at the discretion of the Commissioners Court, etc" appearing in Section 21, supra, does not mean that the revenue so provided may be used for other purposes than full-time health service, public welfare, and agricultural extension service.

4. Section 21 of the Act, supra, contemplates that the governing body of the County will use so much of the revenues derived from H. B. 179, supra, so as to cause the agencies named in Section 21 adequately to

function. The Act makes no provision for a surplus to be paid into the General Fund of the County.

Opinion by the Attorney General.

Dear Sir:

I have your letter of the 15th inst. which I quote as follows:

"Section 21 of H. B. 179, in addition to other provisions, provides as follows:

"'One-fourth of the net proceeds collected or received under the provisions of this Act shall be paid into the State Treasury to the credit of the sixty-seven counties of the State and shall be divided and distributed as follows to-wit: One-half of said proceeds shall be divided and distributed proportionately among the sixty-seven counties of the State according to the population of the said counties as shown by the last Federal census; and one-half of said proceeds shall be divided and distributed equally among the sixty-seven counties; provided that the funds divided and distributed to the several counties of the State as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State.'

"Please advise me whether or not under the provisions of the above quoted portion of Section 21 of said Act, in your opinion:

"1. It is mandatory upon the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State to use the proceeds from H. B. 179 exclusively for health service, public welfare, and agricultural extension service.

"2. If the answer to the above question is in the affirmative, please state whether or not, in your opinion, the Commissioners Court, Boards of Revenue or other governing bodies of the several counties of the State may divide the revenue obtained under the above referred to Act among the three governmental agencies designated according to the needs of the several departments, at their discretion, or whether said revenue must be divided equally among said agencies.

"3. Can the phrase 'at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State', in your opinion, mean that the revenue derived from H. B. 179 be used for other purposes than for full time health service, public welfare, and for agricultural extension service?

"If it is your opinion that a full-time health service, and public welfare and agricultural extension service must be provided for by the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State out of the revenue derived from H. B. 179, can the surplus over and above the adequate operation of these three governmental agencies be used by the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State for other legitimate county purposes."

Answering your first question, it is my opinion that the Commissioners Court, Boards of Revenue or other governing bodies of the several counties of the State must use the proceeds from H. B. 179 **exclusively** for health service, public welfare, and agricultural extension service.

With reference to question two, it is my opinion that the county governing body may use their own discretion in dividing the proceeds of H. B. 179 among the several beneficiaries or agencies designated in Section 21 of the Act, and may from time to time shift and re-allocate said funds from one agency to another, using their own discretion and judgment as to the needs of each agency in carrynig on these several functions which are properly identified with the agency. The Act does not require an equal division.

3. I am further of the opinion that the phrase "at the discretion of the Commissioners Court, etc" which appears in Section 21 of the Act, does not authorize the revenue so provided to be used for purposes other than full-time health service, in cooperation with the State Board of Health, or the Federal Government; for public welfare, in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services, in cooperation with the Alabama Agricultural Extension Service, and/or the Federal Government.

4. In my judgment, the Act contemplates that the governing body of the county will use so much of the revenue derived from H. B. 179, supra, as may be necessary to cause agencies named in Section 21 to function adequately. The Act does not authorize any surplus to be paid into the General Fund of the County and used for general purposes.

Section 21. supra, particularly states the proceeds shall be used **exclusively** for full-time health service, in cooperation with State Board of Health and/or Federal Government; for public service in cooperation with State Department or Federal Government; and for extension service in cooperation with the named agency of the State. I think the use of the word "exclusively" confines the use of said money strictly to the operation and conduct of the designated beneficiaries in the Act and that the use of the word "discretion" vests in the Commissioners Court, Board of Revenue or other governing bodies of the several counties of the State the right to say what portion of the money the several agencies may use. The grant of such discretion excludes any idea of compelling an equal division. The Commissioners are on the ground in each county and are charged with the administrative discretion in all county matters. It was, therefore, the intention of the Legislature to permit each county governing body to determine an apportionment or allocation of the proceeds of the Act to the several designated beneficiaries in accordance with the needs of the same.

If at the end of any fiscal year after adequate provision has been made for the several agencies named in the Act, there is any surplus, such amount should be held in trust for the future use of the several beneficiaries, but at no time may such surplus be paid into the general fund of the county or used for any other purpose except as the legislature in the future may direct.

The Act authorized the County Commissioners or other governing body of the County to use their own discretion in determining the amount of the appropriation they will make to the beneficiaries named in the Act, and in no sense directs or compels an expenditure of all funds received each year.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 28, 1937

Hon. Robert T. Simpson, Jr.
Solicitor of Eleventh Judicial
Circuit of Alabama,
Florence, Alabama.

The sheriff receives his pay for abating liquor nuisances under
Section 4682, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 31, 1937 in which you request my opinion
as follows:

"The Sheriff of Colbert County has asked me to get your opinion
on the following questions. (1) How may he obtain pay for his ex-
penses in padlocking a joint under order of the court? He had to pay
for some lumber and pay for a lock and go to other expenses and of
course the defendant is execution proof. (2) Certain beer joints in his
county are creating considerable disturbance on Sunday. I have ad-
vised him that beer joints even though authorized to operate under
the Alabama Beverage Control Act must be governed by the Sunday
statute and cannot open and run on Sunday. What the Sheriff wants
to know is can the Sunday law also apply to dance halls. He has re-
ceived complaints that from twelve midnight until daylight on Sun-
day these dance halls, night clubs, etc., create considerable disturbance
and he wants to enforce the Sunday statute against them if it applies."

Answering your first inquiry, I call your attention to Section 4682, Code
of Alabama, 1923, which is as follows:

"Section 4682. Fees and allowances to officers making seizures when
and how paid.—There shall be allowed the officer making the seizure
under such writ in an injunction case the sum of three dollars and
the sum of ten cents for every mile traveled in making the seizure,
together with such reasonable sum as the court may deem just for
necessary expenses incurred in transporting and providing storage for
liquors and beverages and other movable property seized; all which
costs shall be taxed in the bill of costs, and if not collected from a
defendant, then shall be taxed and paid as in criminal prosecutions in
which the state fails; and the costs in such injunction case, unless
charged against some party defendant by the court and collected from
him, shall be paid as in criminal cases in which the state fails, upon
the court making an order to that effect."

I think the above statute is just about as plain as it can be made and
any comment I might make on the same would not add anything to it.

As to your other requests set out above, I have answered these in an-
other opinion to you containing the same propositions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 28, 1937

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Court of County Commissioners may not dismiss road employee
under Local Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of January 7, 1937, in which you request my opinion
as follows:

"Please refer to Local Acts 1935, page 251, House Bill 1013, Section 2 and to the following provision: 'He (Road and Bridge foreman) shall with the approval of the said Board of Revenue, employ and fix the compensation of all agents, assistants, overseers, workmen and laborers, required for said work, etc.

"Please advise under this provision if the Board of Revenue by Resolution can effect the dismissal of a road employee by majority vote to 'disapprove of the services of said employee and the payment to him of a salary on and after a certain date' said dismissal not being recommended or joined in by the Road Foreman. I wish to know just what authority the Board of Revenue has, if any, with reference to hiring, paying, and firing of an employee of the Road Department."

I am of the opinion that a road employee may be discharged only by the Road and Bridge Foreman of your county. The Local Act (1935 Local Acts, page 251) to which you refer provides that the Road and Bridge Foreman shall employ "all agents, assistants, overseers, workmen and laborers, required for said work", (with the approval of the Court of County Commissioners). The authority to employ is here vested in the Road and Bridge Foreman, and as the authority to employ usually carries with it the authority to discharge, I am of the opinion that in the absence of any special provisions, the foreman, and not the Court of County Commissioners, would have authority to discharge employees.

In construing this act, the Supreme Court of Alabama, in the case of State ex rel McIntyre vs. McEachern, 166 So. 36, points out that when general or unlimited jurisdiction is not expressly conferred on the Court of County Commissioners the powers are special and limited by the grant.

As to the authority of the Court of County Commissioners in reference to employees of the Road and Bridge Department, I refer you to an opinion of this department addressed to Messrs. J. W. Barnum and C. C. McIntyre, as Members of the Court of County Commissioners, Dothan, Alabama, Volume 4, Quarterly Report, page 9, of the Opinions of the Attorney General.

Yours very truly,

A. A. CARMICHAEL.

Attorney General.

April 28, 1937

Hon. H. E. Jordan, Secretary,
Alabama Athletic Commission,
703 Empire Building,
Birmingham, Alabama.

Educational Institution—

Under facts stated, Golden Glove Committee, Inc., is an educational institution and is exempt from the payment of permit fee or tax under Act No. 252, H. B. 197, approved August 21, 1935, (General Acts 1935, page 647).

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of April 5, 1937, in which you state:

"The Golden Glove Committee is a corporation organized to promote and encourage the development of athletic prowess and physical development, among the youth of Alabama and to hold exhibitions, contests, parages, jamborees, tournaments, and to do all things including the making of contracts, advertising, receiving and disbursement of funds, collateral or ancillary to the main objects and purposes of the organization. The affairs of the organization are conducted without pecuniary profit to any member or members of any other private person. On February 3 and 4 of this year the Committee staged a boxing tournament in Birmingham."

You request my opinion as follows:

"Is the Golden Glove Committee, Inc. exempt from the payment of any permit fee or tax on the boxing tournament staged in Birmingham?"

In my opinion, your question should be answered in the affirmative.

Part (d) of Act No. 252, H. B. 197, approved August 21, 1935 (General Acts 1935, page 647) provides as follows:

"***Provided, however, that nothing in this Act shall be construed as permitting, authorizing, or enjoining the Commission to collect any license permit, fee, or tax for any amateur boxing, sparring, or wrestling matches or exhibitions held under the auspices of educational institutions when the proceeds of affairs of this nature are to be used to foster, aid, or abet programs of education in the State of Alabama."

" 'Education' is defined as the process of developing and training the powers and capabilities of human beings, as the preparing and fitting for calling or business, or for activity and usefulness in life, and may be particularly directed to either mental, moral, or physical powers and faculties, but in its broadest and best sense relates to them all. *Lyne High School Ass'n v. Alling*, 154 A. 439, 422, 113 Conn. 200."

"Term 'educational', within Comp. St. 1929, Section 77-202, and Const. art. 8, Section 2, providing for exemption from taxation of property owned and used exclusively for 'educational, religious, charitable, or seminary purposes, when such property is not owned or used for financial gain or profit,' taken in its full sense, is a broad, comprehen-

sive term, and may be particularly directed to either mental, moral, or physical faculties, but in its broadest and best sense it embraces them all, and includes, not merely the instructions received at school, college, or university, but the whole course of training—moral, intellectual and physical. An educational purpose is synonymous with an educational undertaking, and whatever educates is within the meaning of an 'educational undertaking.' *Ancient and Accepted Scottish Rite of Free-masonry v. Board of County Com'rs.*, 241 N. W. 93, 95, 122 Neb. 586.

"The word 'educational', as used in Tax Law, Section 221, exempting bequests to educational corporations from transfer tax, is not used in the meaning of instruction by school, college, or university, which is a narrower or more limited meaning of the word; but in it broader significance as the act of developing and cultivating the various physical, intellectual, and moral qualities towards the improvement of the body, the mind, and the heart. In *re Moses' Estate*, 123 N. Y. Supp. 443, 446, 138 App. Div. 525.

"Bequest to city to be used by city for purpose of providing playground for children held for 'educational' use within Pub. Laws No. 280, providing that no bequest or devise, whether in trust or otherwise, for educational purposes, shall be invalid by reason of indefiniteness or uncertainty of object, nor by reason of the same contravening any statute or rule against perpetuities. *Greenman v. Phillips*, 217 N. W. 1, 241 Mich. 464."

"A gymnastic association where regular gymnastic exercises are taught and a teacher in physical culture is constantly employed is an 'institution of education' within Const. 170, exempting such institution from taxation. *German Gymnastic Ass'n. of Louisville v. City of Louisville*, 80 S. W. 201, 117 Ky. 958, 65 L. R. A. 120, 111 Am. St. Rep 287."

The premises considered it is my opinion that the Golden Gloves Committee, Inc. is an educational institution, and as such becomes within the exemption, *supra*, and that the proceeds of its tournament are used to foster, aid or abet programs of education in the State of Alabama.

Yours very truly,
A. A. CARMICHAEL.
Attorney General.

April 28, 1937

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

County not liable for tax on merchandise and commodities purchased for lawful county governmental purposes under Alabama Luxury Tax Act.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 2, 1937, requesting my opinion as follows:

"It is our understanding that under Sales Tax Bill recently passed by the Legislature and going into effect March 1, 1937, that State and cities are relieved from this tax. Please advise whether or not the county must pay this tax for purchases for county government.

"Can the State tax the county which is an arm of the State government? Early reply is requested."

In my opinion, a county of the State of Alabama is not liable for the tax imposed by the Alabama Luxury Tax Act (H. B. 179) on such merchandise and commodities as are purchased for lawful county governmental purposes.

Answering your second inquiry first, the State clearly has the power to levy any tax upon the county. However, since the funds of the county are derived only from taxes, any tax upon the county will require the levying of a tax by the county to pay the tax to the state, and a tax statute will not be interpreted as taxing the county unless such is the clear legislative purpose. *State v. City of Montgomery*, 228 Ala. 93, 151 So. 856.

The question therefore is whether it was the intention of the Legislature expressed in the Luxury or Sales Tax Act to levy a tax on purchases by the county.

The first question to be decided is whether the Luxury Tax Act is a tax against the seller or the consumer. If it is a tax upon the seller, purchases by the county would not be exempt unless such exemption were clearly expressed in the act. On the other hand, if the tax is upon the consumer, the purchaser, which in this instance would be the county, it will not be interpreted to tax the county unless there is a clearly expressed legislative intention to do so.

This question has been fully considered and briefed on both sides. Similar Acts have been construed by the Supreme Courts of various states, some acts being held to be taxes upon the seller, *People v. Herbert's of Los Angeles*, (Cal.) 39 Pac. (2) 829; *Meyer Construction Co. v. Corbett*, 7 Fed. Supplement 660. On the other hand, the Supreme Court of Kentucky, on a very similar statute, has held such a tax is a tax upon the consumer. *City of Covington v. State Tax Commission*, 257 Ky. 94.

Since a slight change in the words of the statute might change the construction thereof, decisions from other states are of but little guidance in construing this statute. To reach the proper construction requires a consideration of the legislative history of the act and also a consideration of previous statutes passed by the same session of the Legislature.

As you know, this session of the Legislature levied a so-called Gross Receipts Tax, requiring every person, firm or corporation operating one or more retail stores to pay, in addition to all other licenses or taxes, "as a license or privilege tax for the privilege of doing business, an amount equal to 1½ per cent on the gross sales of said business."

Section 2 of the Sales Tax Act Provides:

"There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm or corporation engaged or continuing within this State in business of selling at retail any tangible personal prop-

erty whatsoever, including merchandise and commodities of every kind and character *** an amount equal to two per cent of the gross proceeds of sales of the business, except where a different amount is expressly provided herein."

Had this been all of the act, it is clear that such tax should be construed as a privilege or a license tax levied upon the seller. However, the form of the tax, whether it is designated an excise tax or a license tax, is not conclusive. *State vs. City of Montgomery*, 228 Ala. 93, 151 So. 856.

Such act should be construed as a whole and the legislative intention reached from the whole of the act rather than from the provisions of any one section or from the term applied to the tax by the Legislature.

Both the Gross Receipts Tax and the Sales Tax provide that credit sales are not included in determining the measure of the tax until collection of such credit sales shall have been made, so this provision does not assist in reaching a correct interpretation.

In Section 24 of the Sales Tax Act it is provided:

"It shall be unlawful for any person, firm, corporation, association or co-partnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same."

While it is a matter of common knowledge that indirectly all taxes are passed on to the consumer, this act requires that such taxes be passed directly to the consumer. Section 26 of the act provides that for the purpose of more efficiently securing the payment of the tax, the State Tax Commission may provide for certain tokens "to enable purchasers and recipients of taxable sales, service, and transactions, to pay the tax."

Construing the act as a whole, therefore, and in the light of the Gross Receipts Tax, my conclusion is that the tax should be construed as a tax on the consumer rather than on the seller. The fact that the first act was called a tax on gross receipts, while this act is by its terms called a "sales tax"; the fact the gross receipts tax made no provision for passing the tax on to the consumer, while the sales tax expressly requires that the tax be passed on to the consumer and sets up a machinery for supplying tokens to enable the purchaser to pay such tax, indicates a clear legislative intention that the tax shall be a tax upon the "purchasers and recipients of taxable sales."

Having determined this, the next question becomes whether the county is exempted from paying the tax levied on other consumers. In *State v. City of Montgomery*, 228 Ala. 93, 151 So. 856, the Supreme Court stated:

"The funds of a city and county are derived both from property taxes and excises, if that is material to this inquiry. In any event, it is the imposition of a tax to pay a tax. Unless such is the clear legislative purpose, an act will not be so interpreted."

Again in *Van Brocklen v. Anderson* 117 U. S. 151, 29 L. ed. 845, 852 we find the following:

"General tax acts of a State are never, without the clearest words, held to include its own property or that of its municipal corporations, although not in terms exempted from taxation. *Buckley v. Osburn*, 8 Ohio, 180, 187; *Piper v. Singer*, 4 Serg. & R. 354 *Directors of the Poor v. School Directors*, 42 Pa. 21; *People v. Doe*, 36 Cal. 220; *Worcester Co. v. Worcester*, 116 Mass. 193; *Trustees of Public Schools v. Taylor*, 30 N. J. Eq. (3 Stew.) 618; *Trustees of Public Schools v. Trenton*, Id. 667; *Rochester v. Rush*, 80 N. Y. 302; *State v. Hartford*, 50 Conn. 89. The reasons for this have been well stated in the cases in Massachusetts and New Jersey. Mr. Justice Devens, delivering the opinion of the Supreme Judicial Court of Massachusetts, said: 'The property of the Commonwealth is exempt from taxation because, as the sovereign power, it receives the taxation through its officers or through the municipalities it creates, that it may from the means thus furnished discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions.' 116 Mass. 194. And Mr. Justice Depue, delivering the opinion of the Court of Errors of New Jersey, said: 'The immunity of the property of the State, and of its political subdivisions, from taxation, does not result from a want of power in the Legislature to subject such property to taxation. The State may, if it sees fit, subject its property and the property owned by its municipal divisions to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the State or its municipalities. Such property is therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it.' 30 N. J. Eq. (3 Stew.) 681.

"In short, under a republican form of government, the whole property of the State is owned and held by the State for public uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction."

There is no clear legislative purpose to require counties to pay such sales tax on purchases for county governmental purposes. It is true that the Legislature in subsection (f) of Section 2 of the Act granted an express exception of sales to the state and the city. It did not except sales to counties. From this omission of counties there is some argument that by the application of the maxim, "*Expressio unius est exclusio alterius*," i. e., the expression of one thing is the exclusion of another, that by the express exception of states and cities the exception of counties is excluded. In my opinion, such maxim has no application to this question. The theory of this maxim is that where the Legislature expressly exempted states and cities, but failed to expressly except counties, they indicated a legislative intent that counties should not be excepted. However, the courts have recognized that such omission might be through mere inadvertence, and that the maxim should be employed advisedly. *Ramsey Motor Co. v. Wilson*, (Wyo.) 30 P. (2d) 482. In *Colquhoun v. Brooks*, Law Rep. (1887) 19 Q. B. D. 400-406, Judge Wills remarked:

"I may observe that the method of construction summarized in the maxim 'Expressio unius est exclusio alterius' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the 'expressio' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind."

On review of this case, Law Rep. (1888) 21 G. B. D. 52-65, in the Court of Appeals, the following language was used by Lopes, L. J.:

"The maxim 'Expressio unius, exclusio alterius,' has been pressed upon us. I agree with what is said in the Court below by Willis J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

To reach such a conclusion from this act would be anomalous because Section 21 providing for the division and distribution of the proceeds of the tax provides that certain portions thereof shall go to the various counties. To hold that purchases by the county are subject to the sales tax would not only require the county to levy other taxes to pay such tax, but would require the county to pay a tax, a portion of which is returned to the county. In my opinion, the omission of an express exception of purchases by the county is not such a clear legislative purpose to impose the tax upon the county as is required by the Supreme Court decisions cited above.

I, therefore, advise you that a county is not liable for the tax in question on merchandise or commodities purchased for lawful county governmental uses.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 29, 1937

Honorable J. H. Green,
Circuit Clerk,
Morgan County,
Decatur, Alabama.

Costs:—When a defendant who has been convicted of a felony and paroled by the Governor before said defendant was delivered to the penitentiary; and the Governor fails to remit the costs, said costs constitute a charge against defendant and may be collected from Fine and Forfeiture Fund of the county upon execution and return no property found.

Costs:—No costs payable by Convict Department until convict is delivered to penitentiary officials.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please give me your opinion as to what becomes of the costs of convictions in the following instances:

"1. When the defendant is convicted of a felony, and he appeals, and his case is affirmed—and the Governor paroles defendant before he is delivered to the penitentiary—what becomes of the costs of conviction?"

"2. When the defendant is convicted of a misdemeanor, and he appeals, and his case is affirmed—and the Governor paroles defendant without requiring costs to be paid—what becomes of the costs of conviction?"

In reply to your first inquiry I wish to advise you that in my opinion when the Governor paroles a defendant who has been convicted of a felony before he is delivered to the penitentiary and fails to remit the costs, then such costs cannot be paid by the Convict Department. I refer you to Section 3670, Code of Alabama 1923, which provides in part as follows:

"No cost shall be paid until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in succeeding cases shall be paid when he is delivered to such officials."

The costs in a case of this kind constitute a charge against the defendant and may be collected from the Fine and Forfeiture Fund upon issuance of execution and return "No Property Found." I refer you to Michie's Code 1923, Section 4039. See also *Mims v. State*, 180 Ala. 511-513, 61 So. 811. See also opinion of Attorney General, Quarterly Reports, Vol. II, page 118 and authorities therein cited.

Your second inquiry is answered by an opinion of the Attorney General, found in Quarterly Reports, Vol. 1, page 242, to which I wish to refer you.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 29, 1937

Honorable J. H. Williams,
Superintendent of Banks,
Montgomery, Alabama.

State Superintendent of Banks—Permitted to deposit money in insured banks, despite provision requiring him to secure interest on funds, though insured banks are not permitted to pay interest.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your statement of January 27th in which you ask my opinion as to what action you should take in reference to funds due unpaid depositors

in closed banks. The problem, as you have stated it, is that you, as Superintendent of Banks are required to deposit dividends and unclaimed deposits remaining unpaid in your hands for six months in "one or more State banks at interest" in trust for the several depositors. (Code of Alabama, 1923, 6324.) The Board of Governors of the Federal Reserve System has issued a regulation prohibiting a member bank of the Federal Reserve System from paying any interest on demand deposits either directly or indirectly, and the Board of Directors of the Federal Deposit Insurance Corporation have issued a regulation prohibiting the payment of interest in such cases by all Government insured banks. (Paragraph 8, Subsection V of Section 12B, Federal Reserve Act.) These provisions will become effective on August 23, 1937. All banks in the State of Alabama except eight or ten are Federal Insured Banks and are therefore prohibited from paying interest on demand deposits after August 23, 1937.

You are therefore required by a statute of Alabama to deposit the money at interest, and by a subsequent enactment of Congress, certain banks are prohibited from paying interest on such deposits.

Under all the circumstances, I am of the opinion that it is now practically impossible to carry out the terms of the Act and insofar as this conflict occurs, you will not be liable, but may make deposit without requirement of interest when necessary. Safety of funds deposited was the primary consideration of the legislature rather than the interest to be received.

A similar bank regulation received attention in Pennsylvania (1936) in the case of *Dalzell vs Kane*, 123 A. 782. An act of that state required a certain board to make deposits and provided that the "rate of interest shall be not less than two per centum per annum, calculated on daily balances." No bank would accept the deposit on this basis.

The court held that the main purpose of the act was to secure safe depositories of the county monies and that this was more important than the interest, and that where strict compliance with law is impossible, compliance as near as can be, is allowed on the principal that the law does not request impossibilities. Said the court:

"If the law is the perfection of wisdom, it should have evolved some principal to take care of such a situation as this case presents. It has done so. When strict compliance with the terms of the written law is impossible, compliance as near as can be, under judicial sanction, is allowed. This principle was recognized by Judge Endlich in his scholarly work on the Interpretation of Statutes. He says, section 441, page 627:

'Enactments which impose duties on conditions are, when these are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that *lex non cogit ad impossibilia aut inutilia*. They are understood as dispensing with the performance of what is prescribed, when performance is impossible (e); for the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and this general exception is a general rule of statutory construction.' See, also, the same author, section 265, page 351. 'It is a settled rule of construction that the Legislature will be presumed to have intended what is reasonable and effectual, and not what is productive of absurd or anomalous consequences, or is impossible and incapable of execution.' In *re Foster's Petition*, 243 Pa. 92, 98, 89, A. 819, 821."

In the case of Jefferson County ex rel Coleman vs. Jefferson County Fiscal Court (1933) 250 Ky. 129, 61 S. W. (2d) 1109, the court held valid a county court's order depositing county funds in a local bank without interest where the law required that designated depositories should pay interest at not less than two per centum on daily balances, but all banks in the city and county had declined to enter into negotiations of the deposit of county funds on such terms.

That county made the following statement:

"The manifest object of the act was clearly one looking to securing a general betterment and safeguarding of county fiscal policy through a uniform budget system, rather than the imposition of a rigid statutory rule, serving in some instances, as here, to embarrass, hinder, and obstruct the county's chosen fiscal agents in administering its fiscal affairs as interpreted as insisted upon by appellant."

The court further states that its decision is not to be construed as interpreting their statute as being anything but mandatory and that their statute was mandatory "where found possible."

See also State ex rel Hansen vs. Chelan County (Wash. 1936) 54 P. (2d) 1006. Compare National Surety Company vs. State et al, 219 Ala. 609, 123 So. 202 (1929).

It is, therefore, my opinion that if in making deposits it becomes necessary in order to secure the safety of deposits, for you to place these funds in a bank which cannot by government regulation pay interest, you are relieved from requiring the payment of such interest.

Yours very truly,
A. A. CARMICHAEL.
Attorney General.

May 1, 1937

Hon. Fred H. McDuff,
Sheriff, Jefferson County,
Birmingham, Alabama.

Alabama Beverage Control Act—

An exhibit or display of whiskies, wines, beers and ales for the purpose of advertising same held illegal, though the whiskies, wines, beers and ales used in said exhibit or display are purchased in the manner provided by the Alabama Beverage Control Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 21, 1937, which follows:

"I have been requested by Mr. Frank Drane, who is President of the Birmingham Hotel Association and who wishes to observe the law in every way and in doing so has asked me for an opinion on an exhibition of wines, whiskies, etc., which would clear through the Alabama State Stores, all bearing the required Alabama State stamps, being placed by the manufacturers of these goods who chose to come into

the exhibit, and an exhibit of beers and ales, which would come direct from the distributors or brewers, bearing the Alabama State stamps. In other words, everything except beers and ales would be gotten from the State Stores by the distillers or agents who were coming into the exhibit. The equipment and fixture people, of course, would not come under the jurisdiction of the State Beverage Act.

"The exhibit and display, if held, would be on the second floor of the Thomas Jefferson Hotel, in the Terrace Ball Room, Jefferson, Red and Gold Rooms, under the sponsorship of the Birmingham Hotel Men's Association on May 2, 3, 4, and 5. It would be held at the time of the Annual Convention of the Alabama State Hotel Men's Association, which meets on these dates.

"No beverages of any kind would be sold at the exhibit, and none given away. It would simply be an exhibit.

"I would appreciate very much your opinion on the above, and if it is legal so that I may in turn inform Mr. Frank Drane."

In my opinion, an exhibit or display of whiskies, wines, beers and ales, in a manner such as you outline in your letter of inquiry would and could be for no other purpose than for the advertisement of the same and would, therefore, be illegal, even though the whiskies, wines, beers and ales used in said exhibit or display were purchased in accordance with the provisions of the Alabama Beverage Act.

The Alabama Beverage Control Act contains the following provisions in regard to the advertising of alcoholic beverages: Section 6 (g) reads, in part, as follows:

Article 5 of page 167, Code of 1937, is hereby repealed."

This article of the code is the article which prohibited all advertising of alcoholic beverages. This same section 6 (g) elsewhere provides:

"Neither the Board nor any State Store operated by it shall in any manner advertise its wares for sale."

Section 10 reads in pertinent part as follows:

"There shall be no advertising of alcoholic beverages as enumerated and defined herein, except through newspapers, magazines and radio broadcasting stations, provided, however, that malt or vinous beverages as herein provided may be advertised by means of billboards."

Section 28 reads in part as follows:

"There shall be no electric signs, painted signs, etc., displayed outside any place of business advertising alcoholic beverages as enumerated and defined."

Any advertisement of alcoholic beverages other than in the manner provided for by the above quoted provisions of the Alabama Beverage Control Act is illegal and contrary to law.

Since an exhibit or display of whiskies, wines, beers and ales for the purpose of advertisement is not in accordance with the above quoted provisions of the Act, supra, which set out the manner in which alcoholic beverages may be advertised, such an exhibit would, in my opinion be illegal and contrary to law.

Yours very truly,
A. A. CARMICHAEL.
Attorney General.

May 1, 1937

Hon. John D. McNeel,
Administrator, Alabama Alcoholic
Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Counties and municipalities held to share with the State only in the net profits derived from the proceeds of the State Liquor Stores and not in the revenue derived from the State Tax on malt or brewed beverages and the State application, filing, permit and license fees provided by said Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you request my opinion on the following question:

Do counties and municipalities share with the State, in the percentages provided by sub-section (c) of Section 9 of the Alabama Beverage Control Act, in the net profits from the proceeds of the State Liquor Stores only, or do they share with the State, according to the percentages set forth in said section, in the revenue derived from the State Tax on malt or brewed beverages and the State application, filing, permit and license fees provided by the said Act, as well as in the net profits of the proceeds of the State Liquor Stores?

It is my opinion that the counties and municipalities share with the State, according to the percentages provided by subsection (c) of Section 9 of the Alabama Beverage Control Act, **only** in the net profits derived from the proceeds of the State Liquor Stores, and that they do not share with the State in any manner in the revenue derived from the State Tax on malt or brewed beverages and the State application, filing, permit and license fees provided by the said Act.

Sub-section (c) of Section 9 reads in part as follows:

"The net profits derived from the proceeds of the State Liquor Stores under the provisions of this Act shall be paid out and applied monthly as follows: Fifty per cent shall be covered into the General Fund of the Treasury of the State; ten per cent shall be covered into the Treasury of the State to be used and the same is hereby appropriated exclusively for Old Age Pensions, and for other purposes of the State Department of Public Welfare. Ten percent shall be covered into the Treasury of the State to the credit of the sixty-seven Counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective general funds; ten percent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties and shall be paid to them to be used by them exclusively for the purpose of Public Health, Old Age Pensions, and for other purposes of the County Departments of Public Welfare; twenty per cent of the net profits of each Liquor Store to be paid to the municipality in which such State Store is located. Payment to be made to each of the several counties and incorporated towns and cities by warrant of the State Comptroller not later than the 20th of each month following collection. No liquor store

shall be placed or maintained outside a municipality, provided that in counties not having a municipality such store may be placed in the County Seat." (Emphasis ours).

You will note that the above quoted provisions, which are the **only provisions in the Act providing for a distribution of monies derived under the Act between the State, counties and municipalities**, refer only to the net profits derived from the proceeds of the State Liquor Stores and that they do not refer to the revenue received from the State Tax on malt or brewed beverages or from the application, filing, permit or license fees levied by the State under the provisions of the Act. Therefore, in my opinion, it is very clear that the counties and municipalities **only** share in the net profits derived from the proceeds of the State Liquor Stores and that they do not share in the other revenue received by the State from the taxing and licensing provisions of the Act. In my opinion, the plain, clear and unambiguous wording of the above quoted provisions of the Act admit of no other interpretation.

Yours very truly

A. A. CARMICHAEL.

Attorney General.

May 1, 1937

Hon. John D. McNeel,
Administrator, Alabama
Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Alabama Alcoholic Beverage Control Board may authorize the administrator to make direct purchase of liquors and/or supplies and materials necessary for carrying into effect the general purposes of said Act, and such purposes do not have to be made on requisition to the State Board of Administration.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 20, 1937, which follows:

"You are respectfully requested to refer to the following Sections of House Bill No. 44, by Mr. Boswell, passed during the 1936-37 Special Session of the Legislature and known as the Alabama Beverage Control Act.

Section 4

Subsections "A", "B", "D", "E", "G", and "L"

of Section 6.

Subsection "A" of Section 7.

Section 53.

"Please advise if the Board may authorize the Administrator to make direct purchase of Liquors and/or Supplies and Materials neces-

sary for carrying out the general purposes of this Act. If this authority is not granted, please advise if all or any of such purchases must be made on requisition to the State Board of Administration."

In my opinion, the Alabama Alcoholic Beverage Control Board may authorize you, the administrator, to make direct purchase of liquors and/or supplies and materials necessary for carrying into effect the general purposes of the Alabama Beverage Control Act.

Section 4 of this act is the section which provides for the appointment, fixes the compensation, the term, qualifications etc. of the members of the Alabama Alcoholic Beverage Control Board.

Section 5 of the Act provides for the appointment, fixes the qualifications, and compensation and deals generally with the duties of the administrator, who is the administrative officer of the Board.

Section 6 deals with the functions, duties and powers of the Board and provides, in pertinent parts, as follows:

"Section 6. The functions, duties and powers of the Board shall be as follows:

"(a) To buy, manufacture and sell alcoholic beverages and to have alcoholic beverages in its possession for sale, as defined and enumerated herein.

"(b) To control the possession, sale, transportation and delivery of alcoholic beverages as enumerated and defined herein.

"(d) To make provision for the maintenance of warehouses for alcoholic beverages and to control the delivery of alcoholic beverages to and from such warehouses and the keeping of same therein.

"(e) To lease, occupy and improve any land or building required for the purposes of this Act.

"(g) To purchase, lease or acquire the use by any manner whatsoever of any plant or equipment which may be considered necessary or useful in carrying into effect the purposes of this Act, including manufacturing, rectifying, blending and processing plants; the Board is hereby empowered to purchase, build, lease and operate distilleries and to manufacture alcoholic beverages if in its opinion the purposes of this Act can be thereby promoted. The price of all spirituous and vinous liquors dispensed by the Board shall be fixed by the Board and location of liquor stores shall not be adjacent to schools or churches or in a neighborhood which is exclusively residential. Neither the Board nor any State store operated by it shall in any manner advertise its wares for sale, Article 5, of Chapter 167 of 1923 is hereby repealed.

"(1) To lease and furnish and equip such buildings, rooms and other accommodations as shall be required for the operation of this Act.

"(m) All liquors, vinous beverages and alcohol sold or distributed by the Board or any licensee of said Board shall be stamped or endorsed in such characteristic way or manner to be determined by the Board as shall clearly indicate that it has been dispensed by the Board, and all such liquors, vinous beverages or alcohol not containing such label shall be contraband and subject to forfeiture as other contraband liquors. The Board is hereby authorized to purchase from time to time the necessary stamps, crowns or lids in a quantity sufficient for a period

not to exceed six months, for identifying each article sold and/or distributed by and through said 'State Liquor Stores.' "

Section 53 of the Act reads as follows:

"Section 53. The Board is hereby authorized to employ such clerical assistants, field agents, inspectors and chemists as may be necessary to carry out, enforce and administer the provisions of this Act; to make direct purchases of 'Revenue Stamps, Crowns or Lids' and/or stamps, crowns or lids to be used in identifying articles enumerated and defined herein, sold and/or distributed by State Liquor Stores, as provided for in this Act; to prepare and have printed such blanks, forms, reports, receipts and any and all other things which may be necessary to provide for the administration of this Act; and to pay any and all such expenses so incurred out of the fund collected under the provisions of this Act. The sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars or so much thereof as may be necessary, is hereby appropriated out of the General Fund of the State Treasury, and to be used by the Board in defraying any expenses which may be incurred in the administration, and in preparing to administer this act before sufficient funds shall have been collected from licenses, taxes and earnings as hereinbefore provided."

In my opinion, it is very clear from the above quoted provisions of the Act that the Alabama Alcoholic Beverage Control Board may authorize the administrator to make direct purchases of liquors and/or supplies and materials necessary for carrying into effect the general purposes of the Act and that it is not necessary that such purchases be made on requisition to the State Board of Administration.

However, I call your attention to the fact that Sub-section (c) of Section 9 of the Act provides, in part, as follows:

"All claims against said monies received under the provisions of this Act shall be first audited and approved by the Board or designated agency, and all such claims so audited and approved by the said Board or designated agency must then be audited and approved by the State Comptroller and the Governor before being paid."

Of course, this provision refers to the method of payment of claims and not to the method of purchase.

Yours very truly,
A. A. CARMICHAEL.
Attorney General,

May 6, 1937

Hon. R. E. Smith,
President Pro Tem,
Jefferson County Commission,
Birmingham, Alabama.

Alabama Beverage Control Act—

Counties held to be without authority to levy a bottle tax on malt beverages.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your letter of April 20, 1937, has been received. The letter follows:

"Please advise whether in your opinion Jefferson County is authorized to levy a bottle tax on malt beverages. It is meant by this, a tax on the sale of each bottle of beer or other malt beverages in Jefferson County."

In my opinion, Jefferson County is without authority of law to levy a bottle tax on malt beverages sold in that county.

In an opinion of this office under date of April 1, 1937, addressed to Hon. John D. McNeel, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, we dealt with the subject of what licenses counties might levy by virtue of the authority granted to them by the provisions of the Alabama Beverage Control Act. Enclosed find a copy of this opinion for your information. In this regard, it will be noted that the licenses which counties have the authority to levy by virtue of the provisions of the Alabama Beverage Control Act, are the only licenses, taxes or fees which the Act authorizes the counties to levy.

It is a well-settled principle of law that county governing bodies have only such authority to levy licenses and taxes as is granted to them by the Legislature. Counties have no inherent power to levy licenses or taxes. In dealing with this particular question, the Supreme Court of Alabama, in the case of Phoenix Carpet Company vs. State, 118 Ala. 143, speaking through Mr. Chief Justice Brickell, had this to say:

"Counties have no inherent power of taxation; they have only such power as is delegated to them, and must have express authority of law to sanction the taxes they demand. Cooley on Taxation, 678; Burroughs on Taxation, Section 138."

Since the Alabama Beverage Control Act grants no authority to the county governing bodies, whose power and authority to tax is, as is shown above, strictly limited to the power and authority delegated to them by the Legislature, it is my opinion that Jefferson County is without authority of law to levy a bottle tax on malt beverages sold in that county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 6, 1937

Hon. O. L. Andrews,
Clerk Circuit Court,
Tenth Judicial Circuit of Alabama,
Birmingham, Alabama.

Alabama Beverage Control Act—

1. County Commission of Jefferson County held without authority to levy license or privilege tax on retail dispensers of malt beverages to be computed on the basis of $\frac{1}{2}$ c on each bottle or can of such beverage to be sold by such retail dispensers.

2. County Commission of Jefferson County held without authority to levy license or privilege tax on retail dispensers of malt beverages to be computed on the basis of $\frac{1}{4}$ c on each 12-ounce bottle or can of such beverages to be sold by such retail dispensers.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

We have your letter of April 20, 1937, in which you request an official opinion on the following questions:

"(1) Does the County Commission of Jefferson County have the authority to levy a license or privilege tax on malt beverages of one-half ($\$0.\frac{1}{2}$) cent on each twelve ounce bottle or can, or fractional part thereof, of beer, ale, and etc.?"

"(2) Does the County Commission of Jefferson County have the authority to levy a license or privilege tax on malt beverages of one-quarter ($\$0.\frac{1}{4}$) cent on each twelve ounce bottle or can, or fractional part thereof, of beer, ale and etc.?"

It is my opinion that both questions propounded by you must be answered in the negative.

In an opinion under date of April 1, 1937, to Hon. John D. McNeel, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, this office held among other things the following:

"County governing bodies of the 'wet' counties of the State have the right, by resolution, to levy a license on retail dispensers of malt or brewed beverages in such an amount as the county governing body may determine, provided, further, that if a retail dispenser operate more than one such place of business for the sale of malt or brewed beverages, then each additional license issued to him after the first license is graduated upon a basis of 33 $\frac{1}{3}$ % above the cost of the last preceding license, as is provided by sub-paragraph 1 of Sub-section (c) of Section 21 of the Act, supra."

As pointed out in that opinion, a copy of which is enclosed for your information, the following provisions in regard to the right of a county to levy a license on retail dispensers of malt or brewed beverages appear in the Alabama Beverage Control Act: Sub-section 3 of Section 22, which is the section dealing with license fees and the distribution of revenues, reads as follows:

"In the case of a retail dispenser, such license fee as may be levied by the county in which his place of business is located, and shall be paid to the Board,"

and sub-section 7 of the same section contains the following provisions:

"License fees paid for retail dispenser licenses shall be paid by the Board to the counties in which the licensed places are located, and in which such licenses are levied."

We likewise find the following additional provisions in the Act, supra, which are pertinent to the inquiry now under consideration: Section 22 begins as follows:

"No license shall be issued to any manufacturer, distributor, wholesaler, or retail dispenser until the licensee shall have first paid an annual license fee for such grant, as follows:"

Then follows the various licenses levied on the various classes of business with the provisions of Sub-section 3 and Sub-section 7, above quoted, appearing. Sub-paragraph 1 of Sub-section (c) of Section 21 of the Act provides, in part, as follows:

"Any retail dispenser may be granted licenses to maintain, operate or conduct any number of places for the sale of malt or brewed beverages; but the fees for such licenses shall be graduated upon a basis of 33 1/3 for each license above the cost of the last preceding license."

It will be noted that it is very obvious that the 33 1/3 appearing in the provisions of the Act last hereinabove quoted obviously means 33 1/3%, the per cent being left off through oversight, and it should be considered and read as though it is 33 1/3%. The courts of this State have sanctioned license or privilege taxes levied by counties pursuant to the authority granted to them by the Legislature, which said license or privilege taxes were computed on a basis of a certain amount on each unit of the article sold, for the selling of which the license or privilege tax is levied, such as a license or privilege tax for the selling or storing of gasoline, the license or privilege tax to be computed on the basis of a certain amount on each gallon of gasoline sold or stored by the licensee. See **Standard Oil Company vs. Limestone County**, 124 So. 523. So, since the county governing bodies are granted the authority, as pointed out above, to levy a license on retail dispensers of malt beverages, and no limit is placed on the amount of the license which they may levy, a license to be computed on the basis of a certain amount on each bottle or can of such beverage to be sold by the licensee would be valid were it not for other provisions of the Alabama Beverage Control Act which indicate that it was not the intention of the Legislature to grant counties the authority to levy such a license.

It has been pointed out above that the Act provides that the license levied by the county on retail dispensers of malt or brewed beverages must be paid by the applicant for such a license before the license may be issued to him by the Alabama Alcoholic Beverage Control Board. This provision of Section 22, supra, provides that no license shall be issued until the licensee shall have **first paid an annual license fee for such grant**. If the license levied by the county was to be computed on the basis of a certain amount on each bottle or can of such beverages to be sold by the licensee, it would be impossible to ascertain the amount of the license prior to the time the same was issued and it would be impossible for the provisions of Section 22 in this regard to be complied with.

Likewise, it would be impossible to ascertain, as must be done by the provisions of Sub-paragraph 1 of Sub-section (c) of Section 21, above quoted, what the cost of each preceding license to be issued to a retail dispenser who wanted to operate or conduct a number of places of business would be, so that the cost of each such license could be graduated upon a basis of 33 1/3% above the cost of the last preceding license.

It is my opinion that the provisions of the Act hereinabove quoted and discussed show a clear intention on the part of the Legislature to require that the license levied by county governing bodies on retail dispensers of malt or brewed beverages be on such a basis as the amount thereof could be definitely determined in advance of the issuance of the license by the Alabama Alcoholic Beverage Control Board. That the intention of the Legislature in enacting a law is the law itself, is too well-known to require citations of authority.

Therefore, the County Commission of Jefferson County is without authority of law to levy a license or privilege tax on retail dispensers of malt or brewed beverages to be computed on the basis of $\frac{1}{2}$ c on each bottle or can of such beverages to be sold by the licensee.

Likewise, for the same reasons, the County Commission of Jefferson County is without authority to levy such a license to be computed on the basis of $\frac{1}{4}$ c on each bottle or can of such beverages to be sold by the licensee.

Since you advance the theory in your letter that a license to be computed on the basis of $\frac{1}{4}$ c on each bottle or can of such beverages to be sold by the licensee might be sustained under the authority of Sub-section (b) of Section 350 of the 1935 Revenue Act, it might be advisable to here state that in my opinion that Section of the 1935 Revenue Act is no authority for the levying of a license to be computed on the basis of $\frac{1}{4}$ c per bottle, merely because of the fact that the Beverage Control Act places a State tax of $\frac{1}{2}$ c per bottle or can on each bottle or can of such beverages sold in this State. The $\frac{1}{2}$ c tax levied by the Alabama Beverage Control Act on each bottle or can of malt or brewed beverages is an excise tax and not a license for the privilege of selling the same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 6, 1937

Mrs. M. H. Hurt,
Clerk, Board of Revenue,
Macon County,
Tuskegee, Alabama.

Local Acts, 1935, pp. 44 and 46—Macon County, Alabama.

Clerk of Board limited to salary prescribed by Local Act, 1935, p. 44 (Section 8) for keeping records required by Local Act, p. 46, *supra*.

Opinion by Assistant Attorney General Simmons.

My Dear Madam:

Reference is made to your inquiry which, I quote as follows:

"Under Local Act H 239-Bridges, To establish a Board of Revenue for Macon County, Alabama, etc.

"On page 44 Local Acts 1935, Section 8 the duties and compensation of the Clerk of the Board of Revenue are outlined and the maximum salary of the Clerk is set at \$75.00 per month.

"Under General Acts 1935, County Financial Control Act, Section 8½, page 806, provides for the Judge of Probate or Chairman of the Board of Revenue to keep records provided for in preceding section and authorizing Board of Revenue to provide reasonable compensation for the work of keeping this record.

"If the duties of keeping the records provided for under Section 8½, General Acts 1935, devolve upon the Clerk of the Board of Revenue, is his salary limited to \$75.00 per month, provided for in Section 8, Local Acts 1935, or can the Board of Revenue provide further and additional payment for this extra work?"

It is my opinion that the Clerk of the Board of Revenue of Macon County, Alabama, is not entitled to draw a salary in excess of the limitation expressed in Section 8 of Local Act No. 104, appearing on page 44 of Local Acts for 1935.

Since the Financial Control Act, General Acts of Alabama, 1935, p. 803, does not repeal Local Acts applying to single counties but makes special exceptions thereof (see Section 19 of the Financial Control Act), I presume that the Board of Revenue of Macon County is operating under a Local Act No. 105 appearing on page 46 of the Local Acts, 1935.

It becomes the duty of the Clerk of the Board of Revenue of Macon County to do and perform all acts and duties which may be required of him by the Board of Revenue. The Board of Revenue may require the clerk to do and perform the duties and matters and keep the records required by Local Act No. 105, Local Acts of the Legislature of 1935, p. 46. For the performance of all such duties no extra compensation above the limitation provided by Section 8, supra, Local Acts of the Legislature, 1935, p. 44, can lawfully be paid to the clerk.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Honorable J. H. Blount,
Tax Collector,
Washington County,
Chatom, Alabama.

Tax Collector—Telephones, lines, poles, etc., used as a telephone exchange are personal property and should be sold for taxes under same rules and regulations as all personal property is sold in payment of taxes.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of recent date which I quote as follows:

"I have a local telephone company which has not paid 1936 tax; looks as if I will have to sell for the tax. The assessment was turned in by the State Tax Commission as personal property, wires, poles and telephones.

"Can I advertise by posting notices or will I have to advertise in newspaper and sell as real property is sold?"

Telephones, lines, poles, etc. generally used as and comprising a telephone exchange are personal property and should be sold for taxes under the same rules and regulations prescribed by law for the sale of any other individually

owned personal property for taxes. The poles which are generally set up on the streets or upon leased land or by virtue of a contract which grants an easement on land do not form a part of the real estate, but retain their original identity as personal property. You should therefore proceed with the sale as you would if the equipment had never been put in use as a part of a telephone exchange or service. *Western Union Telegraph Co. vs. Modesto Irrigation Co.* 87 P.190, 192, 149 Cd. 662; *Portland vs. New England Tel. Co.* 68a, 1040; 103 Me. 240; *Streator Tel. Co. vs. Interstate Tel. & Telegraph Co.* 142 Ill. App. 183; *Peo. v. Hall*, 57 Mics. 308, 109 N.Y.S. 402.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Honorable R. J. Westbrook,
Clerk of the Circuit Court,
Marengo County,
Linden, Alabama.

1. Trial tax is collected in the Circuit Courts of Alabama according to an opinion of this office, 1932-34, page 390.
2. As to the proper charging of stenographer's fees in cases, this should be done according to an opinion of this office written June 3, 1931, Biennial Report of the Attorney General, 1930-1932, page 316.
3. As to what papers you are entitled to collect from making copies etc. as to interrogatories, this is regulated by Section 6724, Code of Alabama, 1923.
4. As to what papers are placed or go into the final record, this is regulated by Section 6724, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 20, 1937, in which you request my opinion as follows:

"1. Is a trial tax civil and criminal cases properly chargeable in every case upon final disposition thereof.

"2. Is court reporter or stenographer's fee properly chargeable in all cases, civil and criminal, upon final disposition thereof.

"3. May I claim a fee for copying interrogatories in final records if they are not propounded according to Section 7764 of Article 10 of the Code of Alabama for 1923.

"4. Should every paper filed when a suit is in Court be placed on final records and charged for when the final disposition of a case, civil or criminal, has been made."

In answering your first request, I call your attention to an opinion of this office written to Honorable J. H. Hard, Jr., Comptroller, Biennial Report of Attorney General, 1932-34, page 390. This opinion answers this request.

Answering your second request, I call your attention to an opinion of this office written June 10, 1931, to Honorable E. L. McConnell, Clerk, Circuit Court, Lauderdale County, Biennial Report of Attorney General, 1930-1932, page 316. This answers your request.

Answering your third request, I call your attention to Section 6724, Code of Alabama, 1923, subsection 11 which is as follows:

"Subsection 11. To keep and file the books and dockets and papers in relation to, and the records of all suits which have been determined in the county court, and deposited with them, as they are required to keep and file the books, dockets, papers, and records of suits in the circuit court; and to issue all writs of execution, scire facias, writs of error, or other process on the judgments of such court, returnable as if such suits had been determined in the circuit court."

I do not know just what you have in mind where you say "not propounded according to Section 7764 of Article 10 of the Code of Alabama for 1923." But the above Section which I quote should guide you in this matter.

Answering your fourth request, I again cite you to Section 6724, *supra*, which, when followed will give you the information desired. There are some papers or documents that do not have to go into the final record. But, not knowing just what might arise in the trial of any case from which the final record was made up, I cannot designate item by item what should go in it. My advice to you in this matter is to follow strictly the statute.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Hon. C. M. A. Rogers, Senator,
33rd District, Mobile County,
Mobile, Alabama.

Taxation—Chichester Tax Act No. 126.

1. Gross receipts from sales made to National Banks exempt from payment of tax imposed by Act, *supra*, Section 4 (b).
2. Gross receipts of sales made to incorporated cities and towns of Alabama exempt from tax imposed by Chichester Act, *supra*, Section 2 (f).
3. Gross receipts derived from sales to any person, association, or group for resale as lunches to school children in school building within the State, when the lunches are not sold for profit, are exempt from payment of tax imposed by the Act, *supra*.
4. Gross receipts derived from sales of materials to shipbuilding and repairing plants for construction, repair, towage or pilotage of vessels or barges are exempt from tax imposed by the Chichester Act, *supra*. See last line in Section 4 of the Act.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Mr. Chamberlain and I have been requested to ask for your opinion on the following problems created by the enactment of House Bill 179 'Alabama Luxury Tax Act';

"(1) Section 4 of that Act exempts from the provisions of the Act National Banking Association. The question that has been presented us is whether or not National Banks must pay the tax on articles purchased by them from merchants in the retail business. For example, if a National Bank in Mobile purchases a desk or typewriter, or any other supplies, is the bank subject to the luxury tax imposed by the Act. It has been suggested to us that National Banks are instrumentalities of the Government. In this connection see

Easton vs. Iowa, 188 U. S. 220 and Plymouth National Bank vs. State of Vermont, 231 U. S. 120.

This is a matter in which all of the National Banking Institutions of the State of Alabama are vitally interested, and your early attention to the matter is urged.

"(2) Are purchases made by Counties and Municipalities subject to the tax. This morning one of the leading drug concerns advises us that the City Hospital has made a purchase of medicines and other supplies. The City Hospital is a charitable institution operated by the City of Mobile, with the co-operation of the County. Must the City Hospital pay the tax? Must the City and County pay the tax on their purchases outside of those for charitable institutions?

"Our attention has been directed also to the fact that Subdivision (j) of Section 4 exempts lunches sold school children in school buildings from taxation. If supplies are sold school cafeterias which would ordinarily be subject to taxation, must the school cafeterias pay the retail merchant the tax? If this be true, then the provision in Subdivision (j) of Section IV exempting school children from the payment of the tax is senseless, because the cafeteria must of necessity pass the tax on to the children, as these cafeterias are never operated for profit.

"(3) The closing sentence in Section 4 of the Act relating to exemptions reads:

"Amounts received by any person, firm or corporation from the construction, repair, towage or pilotage of vessels or barges."

"While shipyards are not required to impose the tax, it is not clear whether shipyards must pay the tax on materials sold them in the State of Alabama for shipbuilding or ship repairing. Will you please give your opinion as to whether goods sold shipbuilding and repairing plants are exempt? If they are not, then this exemption is practically meaningless, inasmuch as the companies will have to include the tax they pay in the building or repairing cost."

It is my opinion that National Banking Associations are exempt from payment of the tax imposed by the Chichester Act. Section 4(b) specifically grants this exemption. Since National Banks are exempt from payment of the tax, gross receipts derived from sales to National Banking Associations are likewise exempt from the tax.

It is further my opinion that incorporated cities and towns in Alabama are not required to pay any tax imposed by the Chichester Act. Section 2 (f) provides: "There shall also be excepted from the gross receipts of sales so as not to be taxed so much thereof as is derived from sales of merchandise and commodities to incorporated cities and towns and the State of Alabama, where such merchandise and commodities are purchased for lawful municipal or state purposes." This exemption extends to purchases made by the city of Mobile for the use and benefit of charitable hospitals operated by the City of Mobile with the cooperation of the County.

This office is now considering the liability of the county for payment of the tax imposed by the Chichester Act, but as yet no opinion has been released. I will therefore defer until a later date an opinion in response to your question as to the liability of the County of Mobile for the tax.

It is my opinion that gross receipts derived from sales of commodities or merchandise to any person, association or group by them to be resold, without profit, as lunches to school children in school buildings within the State, are not liable for tax imposed by the Chichester Act.

Section 4 (j) grants exemption to "amounts received from sales of lunches to school children in school building within the State, sold by any person, association or group not for profit." The purpose and intention of the legislature incorporating such an exemption was to relieve school children of the tax burden imposed by the Act. If the specific exemption above quoted is to have a field of operation and if the intention of the legislature is to receive recognition, the exemption from tax must of necessity extend to gross receipts derived from sales of commodities or merchandise to any person, association, or group and by them to be resold as lunches to school children in school buildings within the State, provided, of course, the lunches are not sold for profit. I therefore hold that the gross receipts derived from such sales are exempt.

Answering your inquiry as to the liability of shipyards, for payment of the tax, it is my opinion that Section 4 (l) specifically exempts them from the payment of tax on materials used in the construction, repairing, towage or pilotage of vessels or barges. This exemption likewise extends to gross receipts derived from the sales of materials to such shipyards and by them to be used in the construction, repairing, towage or pilotage of vessels or barges. It was evidently the intention of the legislature not to burden shipyards with the tax imposed by the Chichester Act, and if such was the intent, full and complete relief can only be granted by extending the exemption to sales of such materials to the shipyards. To hold otherwise, would be to defeat the intention of the legislature,

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Probate Judge and Chairman of Court of County Commissioners
not entitled to compensation for keeping records under Section 8½
of County Financial Control Act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 12, 1937, in which you request my opinion as follows:

"Can a Probate Judge, Chairman of the Court of County Commissioners or the President of the Board of Revenue draw compensation under Section 8½, page 806, Acts of 1935 for keeping the records provided for in Section 8, page 805, Acts of 1935?"

In my opinion, the officers named in your letter may not draw compensation provided by Section 8½ of Act 379, Acts of 1935, known as the Financial Control Act. This Section reads as follows:

"Section 8½.—WHO SHALL KEEP RECORD. The record provided for in the next preceding section shall be kept under direction of the Judge of Probate, or the Chairman of the Board, whose duty it shall be to keep this record up to date at all times, and to perform any other duties with reference to accountability, auditing claims, issuing warrants, and supplying such Board with information, as they may deem necessary for the administration of the financial affairs of the County; provided that the Board of Revenue, Court of County Commissioners, or other governing body shall provide for the payment of reasonable compensation for the work of keeping this record."

You will note that under the first sentence of said Section it is required that the record shall be kept "under direction of the Judge of Probate or the Chairman of the Board". In my opinion this is incompatible with the actual keeping of the record by the Judge of Probate or the Chairman of the Board. The compensation provided under the last Section of the Act, is for the actual work of keeping the record and, in my opinion, the Judge of Probate or the Chairman of the Board is not entitled to compensation for supervising the same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Hon. J. M. Lyon, President,
Board of Revenue, Shelby County,
Columbiana, Alabama.

County Board of Revenue has discretion to close and sell alms house.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your recent inquiry in which you ask my opinion as follows:

"Please give us your opinion on the following:

"The Board of Revenue of Shelby County is contemplating closing its Alms House and turning its inmates over to the Department of Public

Welfare. Shelby County is over its constitutional debt limit at the present time. Can Shelby County close its Alms House and make an appropriation to the Department of Public Welfare to care for the poor and paupers of this County?"

In my opinion, your question should be answered in the affirmative. Under the provisions of Code Section 2787 the Court of County Commissioners or Board of Revenue may purchase or at their discretion may sell County Poor House. The court may in its discretion make such appropriation and orders necessary for the regulation and government of the poor. Under Section 231 (5) of the Code, claims for the poor are preferred claims against the County. If in your discretion the poor of Shelby County may be better cared for by closing its Alms House and turning the inmates over to the Department of Public Welfare, in my opinion you are authorized to do so without regard to constitutional debt limit. I call your attention to the provisions of the Luxury Tax Act, Section 21, providing that the respective counties' portions of the proceeds of the Luxury Tax shall be used for public health, **public welfare**, and extension service. I also call your attention to the opinion of this office dated February 20, 1936, Vol. 2, Quarterly Report 182, at page 186.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Hon. Hamp Draper,
Associate Member,
Board of Administration,
CAPITOL.

Partial payments of court costs prior to conviction when defendant is subsequently sentenced to hard labor for non-payment of costs allowed.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"RE: Partial payments of court costs prior to conviction when defendant is subsequently sentenced to hard labor for nonpayment of costs.

"Your opinion is requested on the above subject which is taken from case No. 6057, Henry Edwards, Chilton County.

"As represented to this department by the Clerk of the Circuit Court, the defendant paid the Clerk \$13.00 before sentence was passed and requested that it be applied to the Solicitor's fee which was \$10.00 and the Trial Tax which was \$3.00. At a subsequent date Edward was sentenced to hard labor for non-payment of the costs.

"The Clerk in rendering this department a transcript of the minutes deducted from the costs the amount paid to him and showed the sentence for costs only for that part of costs unpaid.

"We are of the opinion that the Clerk is without authority in accepting such payment in part unless same was held pending the disposition of the case. We further believe that if the defendant is subsequently sentenced to hard labor for non-payment of the costs he would be sentenced for the entire amount accrued and that part of the costs collected would be sent together with the transcript to the Convict Department when convicted where proper credit would be given the defendant."

In my opinion, the clerk has authority to accept partial payment of costs. However, neither the clerk nor the defendant may specify the particular items of the costs to which such payments should be applied. The clerk should forward that part of the costs collected, together with the transcript, to the Convict Department, where proper application of the payment should be made.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Hon. Lawrence K. Andrews,
County Solicitor,
Bullock County,
Union Springs, Alabama.

Purported agreement to purchase all materials and services for construction of a road in effect a contract for the construction of a highway and violative of Section 124, Alabama Highway Code.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 12, 1937, in which you request my opinion as follows:

"On the 12th day of March, 1936, W. E. McNair, Chairman of the Court of County Commissioners, wrote the within enclosed letter, marked A, to the Southeastern Construction Company. On the same day the Southeastern Construction Company wrote to W. E. McNair, Chairman of the Court of County Commissioners, the within enclosed letter, marked B.

"The letter written to the Southeastern Construction Company by W. E. McNair, Chairman of the Court of County Commissioners, was written without any authorization on the part of the Court of County Commissioners and without their knowledge. The Southeastern Construction Company performed some work under the terms of the alleged contract created by said letters and W. E. McNair, Chairman, paid to the Southeastern Construction Company out of the funds of the County approximately \$1800.00 for said work. This payment was made without the authorization or knowledge of the Court of County Commissioners. Please advise me in the premises as follows:

"1. Whether or not the letters, marked A and B, constitute a binding contract against the County in view of the fact that letter A was

written by W. E. McNair, Chairman of the Court of County Commissioners, without the authorization of the Court of County Commissioners of Bullock County, Alabama.

"2. Whether or not the letters, Marked A and B, will constitute a valid and binding contract against the County of Bullock in the event the same is ratified by the Court of County Commissioners, of Bullock County, Alabama, in view of Code of 1923, section 1397 (124)."

In my opinion, whether ratified by the Court of County Commissioner or not, the purported agreement as set out in the letters attached is a contract in violation of Section 1397 (124) Michie's Code 1928. The letter from the Chairman of the Court of County Commissioners to the Southeastern Construction Company dated March 12, 1936, is in form an offer to purchase all necessary materials for the construction of a bituminous paved highway from Union Springs to the Montgomery County line. If this were the entire contract, in my opinion it would be valid. However, in addition to an offer to purchase all necessary materials the letter further offers to rent all equipment and offers to pay for the supervision of the project by the Southeastern Construction Company. The effect of this offer, therefore, is that the county offers to pay a certain sum for the furnishing of all necessary materials, supervision and equipment; in fact, an offer for everything necessary for a completed road except the payment of labor. The purported acceptance of the Southeastern Construction Company was dated March 12, 1936, accepting the offer without reservations or qualifications. Both the offer and the acceptance also guarantee that the cost of labor will not exceed \$150.00 per mile. The effect of such offer and acceptance, therefore, is a binding contract for the complete construction of the road with the exception of the payment of labor up to \$150.00 per mile. Any amounts necessary to be paid for labor over \$150.00 per mile are to be paid by the Southeastern Construction Company.

In my opinion the effect of this offer and the acceptance, if held valid, would allow the Chairman of the Court of County Commissioners and the Southeastern Construction Company to avoid the effect of the Code section cited above requiring all contracts where the estimated cost of work exceeds \$250.00 to be advertised and let to the lowest bidder and proper bond executed by the contractor. Since the alleged contract violates the provisions of this section, in my opinion it is null and void, whether ratified by the Court of County Commissioners or not.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

May 8, 1937.

Hon. J. P. McKee,
Chairman, Court of County
Commissioners,
Washington County
Chatom, Alabama.

Stock law election—County governing body must call election in a particular precinct when a petition meeting the requirements of Section 10208 has been presented to them requesting an election in that precinct, for the purpose of determining whether or not all

stocks, including hogs and goats, shall be prohibited from running at large in said precinct, even though there is already in effect in the county of which the precinct is a part a county-wide partial stock law prohibiting the running at large of hogs and goats only.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have the letter signed by all Members of the Commissioners Court of your county which reads as follows:

"We are writing you requesting that you give a ruling upon the following proposition:

"On this date there has been presented to us a petition as follows:

"State of Alabama,
Washington County,

February 1, 1937.

To the Court of County Commissioners of said County:

We, the undersigned citizens and landowners and bona fide freeholders of Sunflower Precinct No. 15 of said County, do hereby petition the Court of County Commissioners of Washington County, Alabama and state that they desire an election in Sunflower Precinct No. 15, of said County and State to ascertain whether or not a majority of the qualified electors of said precinct desire or favor a law prohibiting the running at large of stock, hogs and goats, in Sunflower Precinct No. 15, Washington County, Alabama.

Respectfully submitted.

Signed by 145 names.

"Some years ago this County held a hog and goat election and a law prohibiting their running at large was declared carried. Since which time the County has been operating under a County wide law prohibiting the running at large of hogs and goats.

"The contention of the present petitioners is that granting that the county wide hog and goat law is valid, still Section 10222 of the Code does not apply as they claim that is only a partial stock law. There is no contention by any one that there is any county wide, or even Precinct wide, cattle and sheep law, or any other stock except hogs and goats prohibited by law from running at large.

"Petitioners further contend that the above petition meets the requirements of Section 10208 and is for the purpose of determining whether any stock, including hogs and goats, cattle and sheep or otherwise, shall be prohibited from running at large in that Precinct.

"We would appreciate your giving us a ruling as to what is our duty in respect to this petition. Petitioners offer to put up enough money to cover the costs of an election to be held in that Precinct. And it is admitted that they have, or will meet any requirement for the calling of an election under Section 10208 of the Code."

It is my opinion that your Court of County Commissioners must, upon the presentation to you of a petition which meets all of the requirements of Section 10208, hold an election, in accordance with the provisions of that section, in the precinct in which the petition calls for an election, for the

purpose of determining whether or not the majority of the qualified electors of that precinct desire a law prohibiting the running at large of all stocks; notwithstanding the fact that your county of which this precinct is a part has a county-wide partial stock law which prohibits the running at large of hogs and goats in the entire county.

A partial stock law which prohibits the running at large of only certain kinds of stock is valid. See **Yates vs. Walker County Commission**, 230 Ala. 361. Notwithstanding the fact that you have such a county-wide partial stock law, however you must hold an election in a particular precinct, when you are requested to do so by proper petition, for the purpose of letting the electors of that precinct determine whether or not they desire a law in said precinct prohibiting the running at large of all stocks, including hogs and goats. If such an election were to result in a majority of the electors voting in favor of a stock law prohibiting the running at large of all stocks, it would in no wise repeal the partial county-wide stock law which you now have prohibiting the running at large only of hogs and goats, which unquestionably could only be repealed in an election held in the manner provided by Section 10222 of the Code and not in the manner provided by Section 10208 thereof. It would merely add to the provisions of the county-wide partial stock law which you now have prohibiting the running at large of hogs and goats so far as that particular precinct is concerned.

If the election resulted in a majority of the qualified electors in that precinct voting against a stock law prohibiting the running at large of all stocks including hogs and goats, the results of said election would not change the county-wide partial stock law which you now have prohibiting the running at large of hogs and goats in said precinct. It would still remain in full force and effect.

The case of **Watson vs. County Commission of Walker County**, 230 Ala. 365, is direct authority for such a holding.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 8, 1937.

Hon. William O. Baldwin,
Chairman, Alabama Alcoholic
Beverage Control Board,
Montgomery, Alabama

Alabama Beverage Control Act—The Alabama Beverage Control Act contains no prohibition against liquor purchased at an Alabama Liquor Store being taken into the premises of a beer licensee and consumed therein.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 22, 1937, which follows:

"May liquor purchased at an Alabama Liquor Store be taken into the premises of a beer licensee and consumed therein?"

In reply, I advise that there is no prohibition contained in the Alabama Beverage Control Act against liquor purchased at an Alabama Liquor Store being taken into the premises of a beer licensee and consumed therein.

The only prohibition or restriction contained in said Act pertaining to the consumption of liquors or wines sold by the State Liquor Stores is that contained in subsection (m) of Section 6 of the Act, which reads, in pertinent part, as follows:

"No Liquors or wines dispensed by such State Stores shall be drunk on the premises and the drinking of the same on said premises shall constitute a misdemeanor."

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 8, 1937.

Hon. William O. Baldwin, Chairman,
Alabama Beverage Control Board,
Montgomery, Alabama.

Warehouse Receipts—The sale of whiskey warehouse receipts in Alabama are subject to the provisions of the Alabama Beverage Control Act and may not be sold in the State unless they are sold to the Alabama Beverage Control Board.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of April 28 in which you ask the following question:

"Are warehouse receipts issued for whiskey stored in a bonded warehouse, outside of the State of Alabama, sold or otherwise disposed of in the State of Alabama, subject to the provisions of the Alabama Beverage Control Act?"

It is my opinion that your question should be answered in the affirmative.

Warehouse receipts are defined as follows:

"A warehouse receipt is a written acknowledgement by a warehouseman that he holds certain goods in store for the person to whom the writing is issued, the essential thing being the acknowledgement by the warehouseman that the goods are in his warehouse or store. 67 C. J., p. 463.

"The delivery of a warehouse receipt by the warehouseman carries the title and constructive possession of the property to the holder of the receipt, and in some jurisdiction there are statutory provisions to this effect. 67 C. J., p. 471.

"A warehouse receipt, although not technically negotiable at common law, may be transferred by assignment in the same manner, and with the same effect, as other contracts; and the transfer and delivery of the warehouse receipt is a symbolical delivery of the goods or merchandise mentioned therein, and has the same effect as the delivery of the goods themselves, even though the warehouseman is not a public one. And when assigned and delivered the receipt operates to vest in the assignee the assignor's title to the goods and also his constructive possession." 67 C. J., p. 474.

In the case of **Warrick v. Liddon**, 230 Ala. page 253, 160 So. page 534, the Supreme Court of Alabama held: "When negotiable warehouse receipts are transferred by delivery, title to the goods passes, but without protection of the law merchant. Although when receipts are negotiated by endorsement the holder is protected like the holder of other negotiable paper."

In the case of **Julius Kessler & Company v. Veio**, 142 Mich. 471, 106 N. W. 173, the Supreme Court of Michigan held:

"An offer and acceptance by letter for ten barrels of whiskey, followed by a segregation of them in the seller's bonded warehouse, and the issuance of warehouse receipts and invoices therefor, constitute an executed contract which transfers title to the whole quantity, though only two barrels are shipped to the buyer at the time of sale.

"The delivery of the warehouse receipts was a sufficient delivery to pass title. Actual delivery is not essential to transfer title to property sold."

I am assuming that the sale and delivery of warehouse receipts, if lawfully made, conveys title to the purchaser.

Ex parte Benjamin Harris & Co., 140 S. E. (S.C.) 101, 55 A. L. R. 1109.

Gibson v. Stevens, 8 How. 384, 12 L. Ed. 1123 (Note 38 A. L. R. 1205).

Tarry v. Penn. Nat'l. Bank, 58 L. Ed. 558, 563.

In my opinion the sale of whiskey warehouse receipts are subject to the control of the Alabama Beverage Control Act to the same extent as the sale of intoxicating liquor itself. As the sale of a warehouse receipt is a sale of the whiskey covered by the receipt. Furthermore, under the Alabama Beverage Control Act, whiskey warehouse receipts may not be sold in the State of Alabama, unless they are sold to the Alabama Beverage Control Board.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 8, 1937.

Hon. William O. Baldwin,
Chairman, Alabama Alcoholic
Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. A restaurant located in a hotel and operated as a part thereof, and dispenses alcoholic beverages pursuant to a license granted to the hotel, is not limited in the cost of alcoholic beverages purchased by it to 50 per cent of the amount expended by restaurant for food supplies.

2. A restaurant located in a hotel but operated under a lease and not by the hotel, and which dispenses alcoholic beverages pursuant to a license granted to it as a restaurant and not to the hotel, is limited in the cost of alcoholic beverages purchased by it to 50 per cent of the amount expended by it for food supplies.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 22, 1937, which follows:

"Sub-papagraph (o) of Section 2, Alabama Beverage Control Act, defines the term 'Restaurant.' Sub-papagraph (c) of the same Section of the Act defines the term 'Hotel'.

"Question 1. Is a 'Restaurant' located in a hotel and operated as a part thereof limited in the cost of alcoholic beverage purchases by the owner, operator or proprietor of such restaurant to fifty percent of the amount expended for food supplies?

"Question 2. Is a 'Restaurant' located in a hotel but operated under a lease, limited in the cost of alcoholic beverage purchases by the owner, operator or proprietor of such restaurant to fifty percent of the amount expended for food supplies?"

In answer to your first inquiry, I call your attention to sub-section (c) of Section 2 of the Alabama Beverage Control Act, the sub-section defining a hotel, which reads as follows:

"The term 'hotel' shall mean establishments within incorporated cities or towns of not less than four thousand five hundred or more than twenty-five thousand (25,000) population, or within the police jurisdiction thereof, defined as places 'where, in consideration of payment, food and lodging are habitually furnished to travelers, and wherein are located, adequately furnished, at least twenty (20) completely separate sleeping rooms with adequate facilities therein under one continuous roof so comfortably disposed that persons usually apply for and receive overnight accommodations therein, in the course of usual and regular travel or as a residence, and which establishment operates a regular dining room constantly frequented by customers each day.' The term 'hotel' as just defined shall, in towns or cities of more than twenty-five thousand (25,000) population, be similarly defined, provided, however, that no such place shall be deemed a hotel unless in towns having a population of twenty-five thousand (25,000) or more it has at least fifty (50) such rooms. Provided, however, that resort hotels not located within incorporated cities or towns may be issued a permit by the Board when said resort hotels shall have met all of the qualifications as set out by the Board, under rules and regulations prescribed by said Board. Provided, further, however, that there shall be no permits issued to tourist camps, road houses, or night clubs."

It will be noted that the above quoted provisions places no limit on the amount of alcoholic beverages that may be purchased by hotels for resale. Therefore, it is my opinion, that a restaurant located in a hotel and operated as a part thereof, and which dispenses alcoholic beverages pursuant to a license granted to the hotel for such privilege, is not limited in the cost of alcoholic beverages purchased by it to 50 per cent of the amount expended by it for food supplies.

In answer to your second question, I call your attention to sub-section (o) of Section 2 of the Alabama Beverage Control Act, defining a restaurant, which reads as follows:

" 'Restaurant' shall mean a reputable place within a municipality of four thousand five hundred population or more, or within the police jurisdiction thereof, operated by a responsible person of good reputation, and habitually and principally used for the purpose of providing food for the public; to place to have an area within a building of not less

than one thousand (1,000) square feet on one floor in one room equipped with tables and chairs accommodating at least fifty (50) persons at one time, and a kitchen apart from such area of one thousand (1,000) square feet but adjoining same, regularly used for the preparation of food for the public, and in which kitchen the food or meals served in such places are prepared. The proprietor or operator of a restaurant as herein defined shall be required to keep an accurate account of all purchases made of food supplies and alcoholic beverages of all kinds, and the cost of alcoholic beverages purchased by the owner, operator or proprietor of such restaurant shall not exceed fifty (50) per cent of the amount expended for food supplies. Provided, however, no permits shall be issued to tourists camps, road houses or night clubs."

It will be noted from the above quoted provision that a restaurant is limited in the cost of alcoholic beverages purchased by it to 50 per cent of the amount expended by it for food supplies.

Therefore, it is my opinion that a restaurant located in a hotel but operated under a lease and not by the hotel, and which dispenses alcoholic beverages pursuant to a license issued to it as a restaurant and not pursuant to a license issued to the hotel in which it is located, is limited in the cost of alcoholic beverages purchased by it to 50 per cent of the amount expended by it for food supplies.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 10, 1937

Hon. H. J. Brogden,
Probate Judge
Covington County,
Andalusia, Alabama.

Operator of rolling store is required to pay state license in every county in which he does business. Act No. 230, Special Session of the Legislature, 1936-1937.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which is set forth in an opinion of this office dated March 16, 1937. I again quote the letter as follows:

"Mr. Harry Simon with the State Tax Commission wrote me that he had asked your department for an opinion as to whether or not a rolling store, under the present revenue law, is required to pay a state and county license in each county in which they operate?

"I will thank you to let him have that opinion as soon as convenient to you as I am very much interested in it as I have one or two rolling stores from Butler and Coffee wanting to pay just county license over here and I don't know whether to accept same or not."

The opinion of this office dated March 16, 1937, addressed to you, is hereby supplemented with this opinion.

At the time the opinion of March 16, 1937, was prepared, there had been no change in the schedule 146, General Revenue Acts of Alabama, 1935, but at the time the opinion was released on March 16, 1937, the legislature of Alabama had amended Section 146, supra. This amendment is reflected in Act No. 230 and was approved March 2, 1937. The opinion of March 16, 1937, was correct at the time it was prepared, but at the time it was released the legislature had amended the schedule. When the opinion was released March 16, 1937, the Acts of the Legislature had not been printed and had not been delivered to this office. The printed Acts were recently delivered to this office and only after this delivery did we ascertain that the law had been changed.

Therefore, it becomes my duty to supplement my former opinion so that you may be informed of the amendment and of the change in the license to be charged.

Act No. 230, Special Session of the Legislature, 1936-1937, amended subsection c of Schedule 146 of Section 348, Revenue Acts of Alabama, 1935, to read as follows:

"(c) Each person using a motor vehicle, doing business as a transient vendor or peddler as defined in this Schedule displaying, selling or offering to sell any goods, wares or merchandise of whatever nature, at retail shall pay to the State in order to engage in such business the following licenses: Upon one (1) motor vehicle, the annual license for each such motor vehicle, not in excess of one, so used, of—\$100.00. Upon two motor vehicles, or more, but not to exceed three, the annual license fee for each such additional motor vehicles shall be—\$130.00. Upon more than three motor vehicles, but not to exceed six, the annual license fee for each such additional motor vehicle shall be—\$150.00. Upon each motor vehicle in excess of six, for each such additional motor vehicle \$200.00. **In addition to the above, there is levied a license of—\$50.00 for the state and a county license of \$50.00 in each additional county in which said business is conducted.** Rolling stores which are controlled or held with others by stock ownership of 25 per cent or ultimately controlled or directed by one management or association of ultimate management, shall be deemed for the purpose of this Schedule as being owned by the same person." (Emphasis is ours).

Subsection (c) supra, requires a rolling store operator, in my judgement, to pay in addition to the regular license, the sum of \$50.00 State license in each additional county where he does business. You will therefore observe this additional charge made for a state license.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 10, 1937

Hon. R. L. Holcombe, Sr.,
Sheriff, Mobile County,
Mobile, Alabama.

Alabama Luxury Tax Act—Food bought by Sheriff pursuant to Section 4827, Code of Alabama, 1923, for which he is reimbursed by the State, and served to state prisoners is exempt from taxes imposed by the Alabama Luxury Tax Act.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry which I quote as follows:

"Please advise me as to the effect of the Sales Tax under House Bill No. 179, approved February 23rd, 1937, on food-stuffs purchased for prisoners placed in the Mobile County Jail, as to whether a Sales Tax can be collected on same or not.

"Section Two, Subsection (f) provides:

'and there shall also be excepted from the gross receipt of sales so as not to be taxed so much thereof as is derived from the sale of merchandise and commodities to incorporate cities and towns of the State of Alabama where such merchandise and commodities are purchased for a lawful, municipal, or state purpose,—.

"I am referring you not only to the Sales Tax Act, but also to the Act fixing the Sheriff's allowance for preparing food for prisoners on page 595 of the General Acts of Alabama of 1935, Regular Session. Section One of the last named Act provides as follows:

'Section 1. That the Sheriffs of the several counties of the State shall receive pay for services in preparing food, serving food and other services incident to the feeding of prisoners, not including the cost of food to be served to such prisoners, as follows: For 1 prisoner \$1.00 per prisoner per day; For each prisoner from 2 to 5 prisoners 50c per prisoner per day; For each prisoner from 6 to 10 prisoners 40c per prisoner per day; For each prisoner from 11 to 20 prisoners 30c per prisoner per day; For each prisoner from 21 to 85 prisoners .05 per prisoner per day.'

"You understand that food is purchased for these prisoners by the Sheriff and whatever amount is charged for same including the tax must necessarily be charged back to the State. There are no more county prisoners, all are taken over by the State."

It is my opinion that all food which the Sheriff buys pursuant to Section 4827, Code of Alabama, 1923, and for which he is entitled to reimbursement out of State funds, in accordance with this Section, is exempt from tax imposed by the Alabama Luxury Tax Act.

Section 2 (f) of the Alabama Luxury Tax Act provides in part that: "there shall also be excepted from the gross receipt of sales so as not to be taxed so much thereof as is derived from sales of merchandise and commodities to incorporate cities and towns and the State of Alabama where such merchandise and commodities are purchased for Lawful municipal or state purposes."

So far as the exemption from payment of the tax imposed by the Alabama Luxury Tax Act, the Sheriff of the several counties in making of purchases of food pursuant to Section 4827, supra, and for which he is reimbursed by the State, is acting as a purchasing agent for the State of Alabama and is bound by the limitations of said Section. The Act specifically exempts the State of Alabama from payment of the tax which exemption includes the tax on any purchases of food made by the Sheriff for State prisoners.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 11, 1937.

Hon. J. Lee Smith,
Judge of Probate, Chilton County,
Clanton, Alabama.

Road Supervisor of Chilton County cannot obligate County to pay expenses above amount fixed by Commissioners Court and cannot control Commissioners Court as to brand of machinery purchased under provisions of local Acts of 1936, pages 3 and 4.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter in which you request my opinion as follows:

"I am asking your opinion for a construction of two features of a Local Supervisor's Bill for Chilton County, which was passed at the 1936 Extraordinary Session of the Legislature. I presume that this Bill is out in pamphlet form and if not, I am sure that your office has been furnished with a copy of the same in requests for former opinions.

"The Bill provides in Section No. 8 that within one month preceding the first Monday in February, May, August and November the Commissioners Court shall by resolution fix and determine the amount of funds which will be available for the purpose of building, maintaining, and constructing the roads of Chilton County for the three months period and that said amount so fixed, other than the salary of the supervisor and his necessary expenses shall not be exceeded by him in constructing, maintaining or repairing the public roads in Chilton County during said period, provided that said Commissioners are authorized from time to time to increase the amount so allowed.

"Suppose, as an illustration, that the Commissioners Court for a period of three months fixed a definite sum to be expended each month and no order was made increasing or allotting any further amounts during said period. Would, therefore, the county be obligated to pay any expenses or obligations incurred by the Supervisor above said definite amount so fixed, other than the Supervisor's salary and his necessary expenses. For illustration, suppose the supervisor employed labor or purchased supplies and materials for Chilton County which exceeded the amount so determined by the Court. Would, in that event, the county be liable and obligated to pay any amounts in excess of the definite amounts so fixed by the Court? You will notice that Section No. 9 provides that no funds shall be expended or any liability created against the County on account of the construction, maintenance or repairing of the public roads and bridges of Chilton County in any other manner than is provided by the terms of this Act.

"The second proposition is this: I would like for you to clarify for me that portion of Section 5 of the Act, which provides as follows:

" 'All materials, machinery, equipment, and all necessary supplies needed for the construction, maintenance or repair of the public roads and bridges of Chilton County, Alabama, shall be purchased only after written requisition therefor, by the Road Supervisor and approved by the Judge of Probate of said County. That upon the filing and approval of such requisition it shall be the duty of said Commissioners Court within the limits as provided by this Act to make purchase of such materials, machinery, equipment and necessary supplies and same shall be paid for by said Commissioners Court out of any funds available for

that purpose other than the general funds of said County, but only upon proper claim filed and approved by said Road Supervisor.' "

"The exact point I desire to know is this: to what extent may the Supervisor control the Commissioners Court in the purchase of road machinery, supplies, materials and equipment. For instance, we presume that the Supervisor desires to purchase a tractor. Would he have a right in his requisition to control the Commissioners and make it mandatory on them to purchase a Deisel tractor or tractor operated by gasoline? Could he, for illustration, designate the price to be paid for this tractor? Could he designate the name of the person or firm from whom this tractor was sought to be purchased. In considering this I would like for you to do so in the light of the Local Bill of Chilton County, a copy of which is herewith enclosed, as to advertising for the purchase of machinery, supplies and equipment, etc. of \$150.00 or more in amount. It can well be seen that if a Supervisor, by virtue of a requisition, can tie the Commissioners down strictly to all particulars asked about, then advertising would be useless."

Your first question is whether the County would be obligated to pay any expenses or obligations incurred by the Supervisor above the definite amount fixed by the Commissioners Court. In my opinion the County would **not be liable for any such obligations.** Under Section 8 of the Act creating the office of Road Supervisor of Chilton County (Local Acts 1936, p. 4), the Commissioners Court is required to fix and determine the amount of funds available for the purpose of building, maintaining and constructing the roads of Chilton County for the three months period. It is further provided, " * * * which amount other than the salary of the said Road Supervisor and his necessary expenses shall not be exceeded by him in constructing, maintaining and repairing the public roads in Chilton County during said period." Under the express provision of Section 9 of said Act, no funds of Chilton County shall be expended or any **liability created against said county** on account of the construction, maintenance or repairs of the public roads and bridges of Chilton County, Alabama, for supervision, labor, supplies, machinery or equipment in any other manner than is provided by the terms of this Act. "Any person furnishing materials or labor under contract or agreement of the Road Supervisor is charged with notice of this limit on the authority of the Road Supervisor. If said Road Supervisor exceeds his authority, such persons furnishing material or labor are not **entitled** to recover therefor from the county."

Your second question is whether the Supervisor may control the Commissioners Court as to type of machinery to be purchased, the price to be paid, or the name of the person or firm from whom the machinery should be purchased. In my opinion, the Supervisor has no right to control the Commissioners in the respects named.

The provisions of Section 5 of the Act set out in your letter should be construed in *pari materia* with the provisions of Act 1, local Acts of 1936 (Local Acts of 1936, p. 3) which Act requires the Court of County Commissioners to advertise for and obtain competitive bids for the purchase of all machinery where the amount of such purchase exceeds the sum of \$150.00. Under the express requirements of that Act the Court of County Commissioners must accept the lowest competitive bid. In my opinion, therefore, the Supervisor is given the right to make requisition for necessary machinery which must be approved by the Judge of Probate of said County. Such machinery must thereupon be purchased by requiring competitive bids under the provision of Local Act No. 1.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 11, 1937.

Hon. A. D. Kirby,
Judge of Probate,
Jackson County,
Scottsboro, Alabama

Local Act—Jackson County—Acts of Legislature 1936-1937, No. 192—H. 253, is unconstitutional and void. Violative of Section 106 of the Constitution.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"On the last week of the 1937 Legislature there was passed a Local Bill for Jackson County regulating and providing pay for the Board of County Commissioners for this County. The Bill was advertised locally in the County paper. I would like to request your ruling on the Constitutionality of said Act, because it provides to pay the Commissioners and the Clerk of the Commissioners Court a Salary each month out of the Local Gasoline Fund and of the General Funds of the County."

It is my opinion that the aforementioned Act is offensive to Section 106 of the Constitution of Alabama and is therefore void.

Notice by publication of the proposed law, according to verification available in the office of the Secretary of State, stated that a bill would be introduced in the Legislature to provide in substance as follows:

- (1) To create a Board of Revenue for Jackson County with the Probate Judge as Chairman;
- (2) To abolish the present Court of County Commissioners, the new members to be elected from the defined districts, and the present Commissioners to serve as first members of the proposed board;
- (3) To fix the term of office of the Board members at four years;
- (4) To provide for filling of vacancies;
- (5) To fix compensation of the members of the Board;
- (6) To confer upon the new Board all the powers now vested in the Commissioner's Court;
- (7) To repeal all laws in conflict with the proposed Board of Revenue, Jackson County, Alabama.

The bill which was passed by the Legislature (No. 192-S. 253) and approved by the Governor, the substitute bill for the original bill, provides in substance as follows: (1) Fixes the salary of the present Court of County Commissioners and makes the Judge of Probate the ex officio chairman of the Board of Revenue without pay for his services except as now provided for by law and also requires each commissioner to give his full time to the duties of his office, otherwise, he shall be subject to removal therefrom; (2) Requires competitive bidding for materials and supplies which amount to more than \$100.00 excepting therefrom the repair parts of tractors and graders; (3) Provides for a uniform system of accounting and bookkeeping to be kept by an experienced book-keeper who shall be employed at a salary not in excess of \$75.00 per month; (4) Requires the salaries of the

County Commissioners to be paid out of the Gasoline fund of Jackson County; (5) Directs all payrolls, bills and accounts to be itemized to the Court of County Commissioners for their approval and requires individual checks to be issued therefor; (6) Prohibits any member of the Court of Jackson County to vote to employ or hire kinsmen; (7) Requires "All materials or road equipment bought by bids or otherwise for more than \$1,000" to be bought by unanimous vote of all the members of the Court of County Commissioners and requires each vote to be entered on the minutes of the Court. (8) Further provides that "all payrolls shall be made by the clerk and voted on in the same way." Also provides "no payroll for employment or services in the county shall be made out in favor of any member of the Court of County Commissioners or foreman." Requires the Court of County Commissioners to salvage all obsolete and useless material and requires that the commissioners shall be diligent in providing a dry place for road machinery while not in use. For violation or for failure to observe proper precautions above noted, the commissioner may be removed from office; (9) Repeals all laws both general, local or special, in conflict with the Act.

A comparison of the provisions of the bill with the published notice of the proposed law reveals a marked variation. The notice apprized the citizens of Jackson County in substance what the proposed law would be, while the law that was passed was a pronounced departure from the one mentioned in the notice.

This variation or departure was a patent transgression of the Constitutional mandate imposed by Section 106 of the Constitution which reads as follow:

"Section 106. No special, private, or local law shall be passed on any subject not enumerated in section 104 of this constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill, and proof by affidavit that said notice has been given shall be exhibited to each house of the legislature, and said proof spread upon the journal. The courts shall pronounce void every special, private, or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

This Constitutional transgression rendered the entire act invalid and I so declare. **Roper v. State**, 210 Ala. 440, 441, 987, 286, **Elba v. Rhodes**, 142 Ala. 689 (38 So. 807) **Wallace v. Board**, 140 Ala. 491, 37 So. 321; **Crook v. Commissioner's Court**, 144 Ala. 505, (39 So. 383;); **Brame v. State**, 148 Ala. 629, (38 So. 1031.)

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 11, 1937.

Hon. J. Hubert Farmer,
Circuit Solicitor, Houston County,
Dothan, Alabama.

State may pursue civil remedy for collection of mileage tax due under Motor Carrier Act of 1932. Duties and authority of State Tax Commission as to such mileage tax defined.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 18, 1937 in which you request my opinion as follows:

"During the year 1936 A and B, as partners, carried on a business of contract hauling of freight by truck between Dothan and Montgomery; this was done with proper permit issued by APSC and filing and approval, among others, of a \$500.00 bond to guarantee payment of mileage tax, etc.

"On November 19, 1936, incorporation papers were filed in Houston County to carry on the same business formerly done by the partnership, and wherein the partners A and B became the main stockholders and officers; the capital stock of \$2500.00 was paid by the said partners conveying to the corporation the trucks and equipment used by them in the partnership, together with a vacant lot here in the city of Dothan; APSC permit was issued to the corporation on December 8, 1936, but according to mileage tax records, the concern did not begin to do business in its corporate name until January 4, 1937; the corporation made and had approved its \$500.00 bond, with A and B—now its principle stockholders—as sureties, on December 8, 1936.

"This contract carrier has not paid any mileage tax since August 1936, either as a partnership or as a corporation, and owes at this time some \$967.27.

"What criminal laws, if any, have been violated by this concern, either as a partnership or corporation?

"In view of H. 324, Schedule 158.21 and Schedule 158.22, pages 528-29, Acts Legislature, 1935, what civil remedies for the collection of this tax has the State of Alabama? What is the procedure? And incidentally, I am curious to know what the State Tax Commission can do before litigation is begun. What are its powers and authority? Are there any prerequisites on the part of the Commission before civil or criminal action is begun? Is action on \$500.00 bond a prerequisite to other civil action? May more than one civil remedy be pursued at the same time?"

Your first inquiry is as to what, if any, criminal laws have been violated by this concern.

In my opinion, the failure to pay the privilege tax is not made a crime by any law of Alabama.

Your other questions are as to civil remedies for the collection of this tax. This tax under the express provisions of the Motor Carrier Act of 1932 is a payment as compensation for the use of the public highway. While it is called a tax in the Act, it is expressly defined to be an excise tax levied under the police power and not a revenue measure. In my opinion either debt or assumpsit would lie to cover the tax due and unpaid. *Jefferson County v. Gulf Refining Company of Louisiana*, 202 Ala. 510:

"It has been repeatedly decided by this court that either debt or assumpsit will lie to recover taxes due and unpaid. If the amount be a sum certain as for a penalty, license, fee, etc., debt is the appropriate action. *Winter v. City of Montgomery*, 79 Ala. 481, 488; *Perry Co. v. Railroad Co.*, 58 Ala. 546; *State v. Fleming*, 112 Ala. 179, 20 So. 846."

Your next question is as to the powers and authority of the State Tax Commission and what that Commission can do before litigation is begun. Under the 1935 Amendment to the Motor Carrier Act as again amended by Act 168, Extra Session of 1936-1937, it is provided:

"The State Tax Commission is empowered and directed to collect all of such taxes under said last named Act."

No method of procedure is directed by that Act. However, I call your attention to Section 93 of the Revenue Act of 1935, Acts of 1935, page 299, setting out the powers and duties of the State Tax Commission. I also call your attention to Section 371 of the Revenue Act of 1935, Acts of 1935 page 565. This Section gives to the State of Alabama a lien on all property belonging to any person liable to pay any tax other than ad valorem taxes. Under subsection (c), the State Tax Commission "may file in the office of the Judge of Probate of any county in the State a certificate showing the agency of the State filing the same, the amount and nature of the tax for which a lien is claimed (including any interest, penalty, additional amount, in addition to such tax, together with any costs that may have accrued in addition thereto) the names of all persons against whose property a lien for such tax is claimed and the date thereof."

In my opinion, the Tax Commission has the authority under this Section to file such a statement in Houston County or any other county where said parties have property.

There are no prerequisites on the part of the Commission before beginning a civil action since the time for payment is set by law and the amount is determined from the statements filed by the contract carrier. No formal assessment is provided for by the Act and in my opinion would not be necessary.

While the Motor Carrier Act requires the filing of a bond in the amount of \$500.00 payable to the State and conditioned on the payment of all fees, taxes and penalties which might be due there are no provisions in the Act requiring that this bond be exhausted before other civil actions can be begun. Therefore, the cases such as *State v. Jefferson County Bank*, 76 So. 53, 200 Ala. 387 holding that where the Legislature has authorized a method of collection such method is exclusive are inapplicable.

Your final question is whether one or more civil remedies may be pursued at the same time. Such civil remedies will be governed by such civil laws applicable thereto. I do not understand what concurrent civil remedies you anticipate pursuing. The enforcement of the laws under Section 371 of the Revenue Act or the enforcement of the bond filed with the Judge of Probate would not prevent the filing of an action in assumpsit or debt.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Hon. Marvin A. Hanks,
Superintendent of Education,
Conecuh County,
Evergreen, Alabama.

Local Act No. 14 (H. B. 144), approved March 17, 1936, is unconstitutional as violative of Section 104, sub-division 28 of the Constitution of 1901.

Opinion by Assistant Attorney General Small.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date which is as follows:

"The 1936 extraordinary session of the Legislature passed a local bill (Conecuh) for the relief of J. H. Kelly, Tax Collector of Conecuh County. The bill as passed provided for the Conecuh County Board of Education to refund \$512.82 to J. R. Kelly. This amount having been charged to Mr. Kelly by the State Examiners. Mr. Kelly is making demand upon the County Board of Education for the refund.

"Is the Act as passed constitutional?"

I am of the opinion that the Act above referred to is invalid in that it was enacted in contravention of Section 104, subdivision 28 of the Constitution of Alabama of 1901, which is as follows:

"Section 104. The legislature shall not pass a special, private, or local law in any of the following cases:

"* * * (28) Remitting fines, penalties, or forfeitures."

The Act in question is clearly a local law attempting to authorize the Board of Education of Conecuh County to refund moneys paid Mr. Kelly in accordance with charges against him incorporated in a report of the Examiner's Department.

The Act in question is not such an Act as was construed by the Supreme Court in the case of *State v. Clemmons et al.*, 220 Ala. 515, wherein it was held that a bill appropriating moneys out of the State Treasury for the relief of a particular individual is not a Local Act such as would require publication of intention to introduce but, inasmuch as it deals with an appropriation out of the State treasury, it is a general law.

The point in the instant case is, in my judgment, determined by a decision rendered by Mr. Justice Knight in the case of *State ex rel. French v. Stone*, 224 Ala. 234, 237, wherein he said as follows:

"We are not unmindful that both Section 124 and Section 104, sub-division 28, refer to remitting fines, penalties, or forfeitures. If it should be conceded, which it is not, that it is within legislative competence to enact statutes remitting fines, forfeitures and penalties, it could not be done by private or special bills, for the all-sufficient reason that the Legislature is inhibited by Section 104, subdivision 28, from passing the private or special act brought forward in this case."

In view of the above decision of the Supreme Court of this State, I am of the opinion that Local Act No. 14, (H. B. 144) approved March 19,

1936, is unconstitutional, and that the County Board of Education cannot legally refund the sum of \$512.82 to Mr. Kelly, as the said Act attempted to authorize them to do.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Hon. Frank M. Stewart,
Executive Secretary,
Alabama State Milk Control Board,
Montgomery, Alabama.

Milk Control Act—Veterans Exemptions—Disabled war veterans exempt from paying license fees imposed by Milk Control Act (Acts 1935, p. 204).

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 30, 1937, in which you request my opinion as follows:

“As provided in the Milk Control Act, approved July 9, 1935, your opinion is requested on the following question.

“Are disabled war veterans exempt from paying license fees imposed by the Milk Control Act?

“We will appreciate you giving us your opinion on this question at the earliest possible convenience.”

In reply, it is my opinion that World War Veterans who meet all the requirements of the Veterans Exemption Act (Acts 1935, p. 1057) which exempts veterans from the payment of any licenses amounting to \$25.00 or less as prescribed by the said Veterans Exemption Act, would be exempt from the payment of the license fees imposed by the Milk Control Act. (Acts 1935, p. 204, Sec. 11) Cf. Quarterly Report of Attorney General, Vol. 11, p. 229.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County,
Bessemer Division,
Bessemer, Alabama.

Tax Assessor has no authority to issue letter of credit for amount of assessment erroneously included in list of property.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 13, 1937, in which you request my opinion as follows:

"I request an official opinion as to whether or not the Tax Assessor should issue a letter of credit for 1936 assessments where property described in Section 2, Item L, included in exemptions, has been assessed and charged to the taxpayers.

"Section 2, Item L:

"All raw materials, including coke produced during the current calendar year, when stocked at any plant or furnace for manufacturing purposes in Alabama.

"Also Item M.

"All manufactured articles including pig iron in the hands of producer or manufacturer thereof shall be exempt from taxation for twelve months after its production or manufacturing."

In my opinion, the Tax Assessor has no authority to issue a letter of credit where exempt property is erroneously included in assessments. There are no provisions in the Revenue Act of 1935 authorizing such a letter of credit. While there are certain provisions permitting the State Tax Commission to set aside assessments (Section 93) and providing the manner in which the taxpayer may have taxes refunded when the assessment is erroneous or excessive (Section 296 et seq.), I find no authority for the Tax Assessor to change an assessment already made final.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Hon. John P. Kohn,
Associate Member,
State Tax Commission,
C A P I T O L .

Interstate Commerce—Foreign corporation engaged exclusively in interstate commerce does not have to qualify in Alabama under Section 309 of the 1935 Revenue Act, as a condition precedent to carrying on that business.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of March 4, 1937, in which you state:

"The Atlantic & Gulf Coast Air Line, Inc., a Florida corporation, will establish an air line for the transportation of passengers, freight and mail between Mobile and points in Florida and Georgia. The air line will transport no persons, freight or mail in intrastate commerce, but will transport passengers and freight solely in interstate commerce. The corporation will rent office space at the municipal airport and will rent space in the hangar for its ship when receiving and discharging passengers and freight. Tickets will be sold at said office by an agent of the company for transportation in interstate commerce and a mechanic will be employed to service the planes in furtherance of the transportation of passengers in interstate commerce."

You request my opinion as follows:

Will it be necessary for the above mentioned Florida corporation to qualify as a foreign corporation in compliance with Section 309 of the 1935 Revenue Act?

It is my opinion from the facts, as stated in your letter that the Atlantic & Gulf Coast Air line, Inc., will be engaged exclusively in interstate commerce, and will not have to qualify as a foreign corporation under Section 309 of the 1935 Revenue Act, as a condition precedent to carrying on that business.

In the case of *Simpson v. Shepard*, 230 U. S. p. 35, the Supreme Court of the United States said:

"That the commerce clause of the Constitution (article 1, Section 8, cl. 3) has conferred upon Congress full power to regulate interstate commerce is all but elementary, and any attempt by a state to interfere with such exclusive regulation has been held unconstitutional and void.

"The general principles governing the exercise of state authority when interstate commerce is affected are well established."

"The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.'" *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. Ed. 23. * * *

In the case of *Western Union v. Kansas*, 216 U. S. 1, the Court said:

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation,—an English or a French transportation company, for example,—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman Steamship Co. v. Tinker*, 94 U. S. 238—Citing *Telegraph Co. v. Texas*, 105 U. S. 460; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 211; *Phila. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 342; *McCall v. California*, 136 U. S. 104, 110; *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114, 118.

"On the contrary, it is to be deducted from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, on account of such business."

In the case of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. p. 196, the following facts appear: The ferry company was incorporated under the laws of New Jersey and maintained a ferry from Gloucester, N. J., to Philadelphia, Pa. It leased a ship or dock in Pennsylvania for the distribution and receiving of passengers and freight. Pennsylvania attempted to levy a tax on the capital stock of the corporation, contending that it was doing business within the State. The Court held that such tax could not be levied and said:

"The question, therefore, respecting the tax in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of inter-State commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

In the case of Haynes v. Pacific Mail Co., 17 How. 596, a New York Corporation owned steam vessels for the transportation of passengers and freight between New York, San Francisco and Oregon. An agency was maintained in San Francisco and a shipyard at Benicia in California for furnishing and repairing its steamers. The Supreme Court held that these vessels were not subject to taxation in California as they were only temporarily there while not engaged in lawful trade and commerce.

In the case of Texas Transport & Terminal Company, Inc., v. City of New Orleans, 264 U. S. 150, the following facts appear; The City of New Orleans filed suit in a Louisiana state court to recover from defendant a license tax of \$400, imposed, for the year 1922, upon its business of steamship agent. The demand was resisted on the ground that the tax was in contravention of the Commerce Clause of the Constitution of the United States in that it was an interference with and tax upon interstate and foreign commerce. Defendant was regularly employed as agent for four steamship lines, under a contract fixing its compensation on the basis of commissions, calculated upon the gross amount of freight charges collected by it for each company. In addition, defendant occasionally represented other ship owners. All were exclusively engaged in interstate or foreign commerce and defendant's business was confined solely to representing principals so engaged in such commerce. The service rendered consisted of soliciting and engaging cargo, nominating ships for carrying it, arranging for its delivery on the wharf, issuing bills of lading under the name of ship owner or charterer, arranging for stevedores for loading and discharging cargo, collecting freight charges, paying ships' disbursements, attending to immigration service and assisting generally in matters of local customers and regulations. Freight moneys collected, after deducting commissions, were remitted to the owners or charterers. As such agent, defendant was authorized to solicit cargo and quote freight rates and to issue receipts in the name of its principal for cargo delivered on the wharf.

The Court said:

"This Court has had frequent occasion to consider and determine the effect of taxes of the same general character as that here involved, and, for present purposes, we find it unnecessary to do more than refer to

the general and well established rule, which is that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the State prior to their introduction therein, *Stockard v. Morgan*, 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. *McCall v. California*, 136 U. S. 104. The latter decision controls the present case. There the agent of a railroad company was engaged in San Francisco in the business of soliciting and inducing persons to travel from the State of California into and through other States to New York City, over the line of railroad which he represented. It was held that the business of the agent constituted a method of securing passenger traffic for the company, and therefore the tax was one 'upon a means or an occupation of carrying on interstate commerce, pure and simple.' The only difference between that case and this is that there the agent was engaged in seeking interstate passenger business, while here the agent was engaged in seeking interstate and foreign freight business. Plainly as pointed out in the *McCall Case*, the principle is the same."

In the case of *Ozark Pipe Line v. Monier*, 266 U. S. p. 555, the Supreme Court of the United States in holding that the State of Missouri could not collect a franchise tax from a foreign corporation whose business in the State consisted exclusively in the operation of a pipe line for transporting petroleum, through the State in interstate commerce, and in ownership of property, maintenance of its principal office, purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and other acts within the State, all exclusively for the furtherance of such interstate commerce, and constituting the means and instruments by which it was conducted said:

"If the business taxed is in fact separate local business, not so connected with interstate commerce as to render the tax a burden upon such commerce, the tax is good. An illustration of such a tax is found in *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, where this Court upheld a state franchise tax upon a cab service maintained wholly within the State of New York by the railroad company to convey passengers to and from its terminus in New York City, for which service the charges were separate from other transportation charges. The principle announced was: 'Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation. *Osborne v. Florida*, 164 U. S. 650; *Pullman Co. v. Adams*, 189 U. S. 420.' On the other hand, in *Norfolk, etc. R. R. Co. v. Pennsylvania*, 136 U. S. 114, 120, a Pennsylvania tax of similar character sought to be imposed upon a Virginia railroad corporation was held bad. The railroad company maintained an officer in Pennsylvania for the use of its officers, stockholders, agents and employees and expended large sums of money in that State in the purchase of materials and supplies for its railroad. It owned a small amount of property in the State. In holding that the tax contravened the commerce clause the Court said:

" 'Was the tax assessed against the company for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employees, a tax upon the business of the company? In other words, was such tax a tax upon any of the **means** or **instruments** by which the company was enabled to carry on its business of interstate commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. * * * Again, the plaintiff in error

does not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its office in Philadelphia it obtained from the secretary of the Commonwealth the certificate required by the act of the State legislature of 1874 enabling it to maintain an office in the State. That office was maintained because of the necessities of the Interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means of instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States.'

* * * * *

"The business actually carried on by the appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

The premises considered, it is therefore my opinion that the Atlantic & Gulf Coast Air Line, Inc., a Florida corporation will be engaged exclusively in interstate commerce. The maintenance of an office at the airport in Mobile, hiring mechanics to service the planes and selling tickets by agents of the corporation, will all be in furtherance of its interstate business. The acts enumerated will be merely incidental to carrying on an interstate transportation service.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Mrs. M. H. Hurt,
Circuit Clerk,
Macon County,
Tuskegee, Alabama

Macon County—Payment of expenses of examinations for county governed by Section 6 of Act No. 105, H. 240, approved June 6, 1935, (Local Acts, 1935, p. 46).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date, which is as follows:

"Construing Section 6 of Local Budget Act H-240-Bridges, Local Acts 1935, page 46, with reference to Section 331 Code 1923, 'Preferred Claims and the order of their priority, as amended June 6, 1935, Acts 1935, page 162, and as amended Sept. 13, 1935, Acts 1935, page 990.

"Can expenses for the payment of State Examiners for examining the books of the County be paid out of the funds of the County if the total amount of preferred claims be more than the amount of money available for the payment of these preferred claims?"

"If so, should all the preferred claims be prorated with the expenses of the State Examiners?"

In answer to your inquiry, I am of the opinion that payment of the expenses of the examination in question is governed by Section 6 of Act No. 105. H. 240, approved June 6, 1935, (Local Acts, 1935, p. 46).

An opinion rendered to you on September 17, 1935, (Quarterly Report, Vol. IV, p. 181) held that Section 6 of the Local Act in question was not repealed by Section 17 of the County Financial Control Act (General Acts 1935, p. 803), and that said Section 6 of the Local Act controlled over Section 17 of the County Financial Control Act. Therefore, we must look to said Section 6 of the Local Act to determine the manner of payment of the claim in question. Section 6 provides as follows:

"Section VI. It shall be the duty of the Board of Revenue and County Commissioners to make appropriations in the following manner: first for the payment or charges required by legislative acts including all preferred claims; second, for the payment of all interest carrying charges and sinking fund for the retirement of all existing indebtedness, which shall receive from the income of the County a sum sufficient to retire any deficit over a term of not more than thirty years; and third, for the operation, maintenance and support of other departments, institutions, agencies and charges. If the Board of Revenue and County Commissioners shall determine at any time that the total income of the County be insufficient to make all appropriations payable in full in the amounts named in such appropriations, it shall be the duty of the Board of Revenue, and they are hereby authorized, to restrict the appropriations beginning with those placed in third classification, which shall be reduced proportionately until such appropriations are completely extinguished; thereafter the appropriations in classification two shall be reduced proportionately; and so on in this order until, in the opinion of the Board of Revenue and County Commissioners, appropriations shall equal the estimated income. Provided, however, that, in the event there are sufficient funds at the end of the fiscal year to pay all appropriations in the amounts named, then all appropriations shall be paid in full."

The first class of preferred claims under said section embraces "payments or charges required by the Legislature including all preferred claims." This, in my judgment, embraces all those involuntary obligations, placed upon the county by the Legislature and not merely the preferred claims set out in Section 231 of the Code of 1923, as subsequently amended. The expenses of the examinations for the county are involuntary obligations placed on the county by Section 749, Code of 1923, and Acts 1935, page 602. Such, therefore, come within the category of "payments or charges required by the Legislature," and said expenses are preferred claims of the first class under the Local Act in question, and should be paid accordingly.

If there are not sufficient funds available to meet all the claims of the first class, as above described, then the payments are prorated according to Section 6 of the Local Act, *supra*. The expenses of the examinations for the county are, in my opinion, subject to the same proration as other claims of the first class, as above described.

The opinion of this office rendered to the State Comptroller on April 14, 1936 (Quarterly Report Vol. IV. p. 120) is not applicable to Macon County because of the Local Act above construed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County,
Bessemer, Alabama.

Taxation—Ad Valorem exemptions to deaf mute—Revenue Act, 1935, Article I, Section 2 (f).

2. Deaf mute entitled to ad valorem tax exemption, supra, of real estate to the extent of his assessable interest but not to exceed the exemption limit.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of April 22, 1937, which is as follows:

"I wish an official opinion on the following case. There are two mutes, husband and wife, assessing jointly a house and lot and they claim they are entitled to an exemption of \$2000.00 each or net 1200.00 each. Should they be allowed jointly \$1200.00 or \$2400.00?"

It is my opinion that each of the deaf mutes is entitled to ad valorem tax exemption, supra, of real estate to the extent of his or her assessable interest, but not to exceed the exemption limit. Joint occupancy of the property would not defeat the exemption provided by law if each deaf mute has an assessable interest in the property. The assessable interest may be joint or separate.

If title to the property is in one of the deaf mutes, then the assessment should be made to the title holder. Joint occupancy of the property without more would not authorize a joint assessment of the property for the purpose of obtaining joint exemptions.

However, if each of the deaf mutes owns bona fide an assessable interest in the property, then each is entitled to his or her exemption, not to exceed an assessed valuation of \$1200.00 for each interest. I can find nothing in the exemption statutes which defeats an exemption of real property in which claimants own a joint assessable interest. Quarterly Report of the Attorney General, Vol. 6, page 130 (March 16, 1937.)

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Act No. 126, 1936-1937, Special Session of the Legislature.

1. Occasional sale made by one as an individual, and not as a retail business transaction subject to payment of tax, not subject to payment of sales tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry which I quote as follows:

"Please refer to the sales tax law recently passed by the legislature and advise as to the following: Is a person who owns say, a mule, wagon, plow or other articles of personal property and who is in the mercantile business but who has bought said personal property for his own use, later desiring to sell same, liable for the 2% sales tax to the State of Alabama."

If the person to whom you have reference in your letter sells such property as an individual transaction, I think it is an occasional sale and therefore not subject to the tax imposed by the aforementioned Act. The sale must be completely disassociated from his retail business.

Section 2 of the Sales Tax Act levies a privilege or license tax against a person on account of business activities. The whole act in my judgment contemplates a tax measured upon the gross receipts derived from retail business transactions, and does not contemplate or impose tax upon occasional sales which are divorced from retail business activities.

If the person you speak of in your letter sells the property as a retail business transaction, or if he incorporates the value of the property or lists the same in his business inventory, then under circumstances the sale would be a part of his retail business activities and the gross receipts derived therefrom would be subject to the tax imposed by the Sales Tax Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Honorable Forrest Castleberry,
Representative from Conecuh County,
CAPITOL.

Local Law—Acts of 1927, p. 242, amended 1931, Acts of Alabama, 1931, p. 31—Conecuh County.

Section 10—Local Law, supra, as amended, is unconstitutional and void in so far as it attempts to fix, prescribe, and regulate fees and compensation of the members of the Board contrary to and in violation of Section 96 of the Constitution.

The general laws of Alabama prescribing fees and compensation to be paid members of the Board have full application to Chairman of said Board who is permitted to draw like compensation and fees.

Members of the Board, including the Chairman, are entitled to pay as provided by Section 6771, Code of Alabama, 1923, as amended in 1931, Acts of 1931, p. 805.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Please rule for me on the validity of Section 10 of an Act approved August 27, 1927, (Local Acts, 1927, page 241), entitled 'An Act to Establish a Board Revenue For Conecuh County, etc. as amended by local acts of 1931 and 1932 relating to payment of the per diem and mileage of members of the board of revenue of Conecuh County.

"If the provision for the payment of the per diem and mileage as set out in said act is not valid, under what provision of the law should the compensation of said board be paid? Also, could chairman draw per diem and mileage for supervision of road work in same manner and amounts as other members of said board."

It is my opinion that Section 10 of the local law mentioned in your letter is unconstitutional and void in so far as that section attempts to prescribe, fix and regulate the fees and compensation of board members. This section in my judgment attempts to fix and prescribe fees or compensation which does not have application to all the counties of the State, but is local in its application. This provision in my judgment is contrary to and in violation of Section 96 of the Constitution of Alabama and is void to the extent of the attempt to fix and regulate fees.—*Carnley v. Moore*, 218 Ala. 277. I pretermitt discussions of other constitutional provisions which this section may violate.

It is further my opinion that members of the Board, including the Chairman, are entitled to fees and compensation as provided by Section 6771, Code of Alabama, 1923, as amended in 1931, Acts of 1931, p. 805.

A reading of the entire Act reasonably leads to the conclusion which I now entertain that it was the intent of the Legislature to relieve the Judge of Probate of Conecuh County of duties and responsibilities which were imposed upon him as ex officio chairman of the Commissioners Court. The title of the Act so states. The Act therefore created a new court composed of four members and in addition thereto a chairman. The members are elected from districts and the chairman is elected from the county at large. The Act confers upon the Board of Revenue by Section 4 thereof "all jurisdiction and powers that are now or may be hereafter by law vested in Courts of County Commissioners of this State, and by any special law now vested in the County Commissioners of Conecuh County; and the several members of the said Board of Revenue shall perform all the duties and services and exercise all the powers that are or may be required by law of the several members of the Court of County Commissioners."

It is, therefore, my conclusion that Section 6771, Code of Alabama, 1923, as amended, prescribing fees and compensation for Courts of County Commissioners has full application to and does prescribe and fix the fees and compensation of the members of the Board of Revenue.

It is further my opinion that the Chairman of the Board of Revenue of Conecuh County is entitled to the same fees and compensation as are prescribed by said Section 6771, as amended, for members of the Board. The Chairman of the Board, by Section 6 of the Act, is invested with the same power and authority as other members in passing on all questions. A reading of the entire Act indicates that the Chairman of the Board has full voice in all the affairs of the Board. The Act prescribes certain other details which are imposed upon the chairman and likewise gives him additional authority in some matters, but to all intents and purposes so far as fees and compensation are concerned he is a member of the Board and for services performed he is entitled to the same fees and compensation that Section 6771, as amended, *supra*, prescribes and fixes for members who perform a like service or services.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 12, 1937.

Hon. Wm. O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Licenses—Restaurants.

1. A restaurant, otherwise qualified for a retail liquor license, is not disqualified if "booths" with tables and benches are installed therein, or if a counter with stools is installed therein, so far as the provisions of the act are concerned, provided, however, that no alcoholic beverages may be sold or served in such "booths" or at or over such counter.

2. In determining minimum seating accommodations at tables with chairs, to meet the requirements of Section 2, sub-section (o) neither the seating accommodations of "booths" with tables and benches or a counter with stools may be included.

3. Alcoholic beverages may not be legally sold or served to persons seated in such "booths" at a table on benches or to persons seated at such counter on stools.

Opinion by the Attorney General.

Dear Sir:

Receipt is acknowledged of your request for opinion as follows:

"The proprietor of a reputable place within a municipality of more than 4500 population, operated by a responsible person of good reputation, and habitually and principally used for the purpose of providing food for the public, has applied to the Alabama Alcoholic Beverage Control Board for a Restaurant Liquor License." The place has an area within the building of not less than 1000 square feet on one floor in one room, equipped with tables and chairs, accommodating more than fifty persons at one time, and the kitchen apart therefrom but adjoining it, regularly used for the purpose of preparing food for the public, in which kitchen the food or meals served are prepared. In addition, the place has a coun-

ter at which there are fixed stools, and also "booths" with benches therein, to serve food to the public.

"Question 1: Does the fact that stools and counters and/or booths and benches are installed in a restaurant, otherwise qualified for a "Restaurant Liquor License", preclude the issuance of such "Restaurant Liquor License" to the proprietor thereof?

"Question 2. May a "Restaurant Liquor License" be issued to the proprietor of an establishment which is not equipped to seat, at one time, fifty persons at tables and chairs, but which may seat fifty persons at tables and chairs and counters and stools and/or booths and benches?

"Question 3. If it is your opinion that licenses may be issued to places equipped with stools and counters and/or booths and benches, may alcoholic beverages and malt or brewed beverages be served to persons seated at such stools and counters or in such booths on benches?"

The answers to your inquiries will be conditioned upon the proper understanding of some of the words used therein as applied to your immediate problem.

The word "chair" is defined by Webster as "A seat, usually movable, for one person. It usually has four legs and may have arms." New International Dictionary, 2nd Edition, while this same source gives us this definition of the word "bench": "A long seat for two or more persons, usually of wood and sometimes with a back."

I understand that certain restaurants have installed tables with seating arrangements which are substantially as follows: A number of tables with benches on two sides, perpendicular to the wall, are arranged along and against the wall of a room; that each bench is wide enough for two or more persons and it may or may not be attached to the table; that the back rests of the benches are high enough to obstruct the front and rear views of persons seated at the tables and at the same time prevent them from being seen by anyone not in close proximity to the open side, which is the side opposite the wall; that the units have no ceiling, cover or roof; that they have no curtain, door or other obstruction on the side opposite the wall and so are not completely cut off or isolated from the room in which they are placed but are a part of it; that the high back rests of the benches serve as front and rear partitions between the tables. I further understand that each unit of a table with benches on each side, in such a seating arrangement, is commonly and popularly referred to as a "booth", and that this is the sense in which you use this term in your request for opinion.

Section 2, sub-section (o) of the Alabama Beverage Control Act provides:

"(o) 'Restaurant' shall mean a reputable place within a municipality of four thousand five hundred population or more, or within the police jurisdiction thereof, operated by a responsible person of good reputation, and habitually and principally used for the purpose of providing food for the public; the place to have an area within a building of not less than one thousand (1,000) square feet on one floor in one room equipped with tables and chairs, accommodating at least fifty (50) persons at one time, and a kitchen apart from such area of one thousand (1,000) square feet but adjoining same, regularly used for the preparation of food for the public, and in which kitchen the food or meals served in such places are prepared. The proprietor or operator of a restaurant as herein defined shall be required to keep an accurate account of all purchases made of food supplies and alcoholic beverages of all kinds, and the cost of alcoholic beverages purchased by the owner, operator or proprietor of such restaurant shall not exceed fifty (50%) per cent of the

amount expended for food supplies. Provided, however, no permits shall be issued to tourist camps, road houses or night clubs." (Emphasis ours).

It is my opinion that a restaurant, otherwise qualified for a retail liquor license, would not be disqualified because of the fact that there were located therein, in addition to the requisite number of tables with chairs, "booths", such as are here described, and/or a counter with stools, so far as the provisions of the Alabama Beverage Control Act are concerned. The act itself does not contain a prohibition against the inclusion of such "booths" or a counter in a restaurant, otherwise qualified. It merely requires a minimum floor space and a minimum seating capacity at tables and chairs in one room. However, no alcoholic beverages may be sold or served in such "booths" or at or over a counter. The above quoted provision of the Act, which defines a restaurant, provides a minimum seating capacity with tables and chairs and makes no mention whatever of "booths" or counters. It is my opinion that the legislature intended for the sale and serving of alcoholic beverages in restaurants to be restricted to persons seated at tables in chairs, as hereinabove defined. We find in another part of the Act a provision which expressly prohibits a restaurant from maintaining any counter or bar at or over which liquors, vinous or malt beverages are sold or served to guests or patrons. Section 16. If such "booths" or a counter are installed in an otherwise qualified restaurant, and are maintained for the sale or serving of liquors, or if liquors, etc., are sold and served in such "booths" or at or over such counter then, it is, in my opinion, a violation of the statute.

Within the limitations hereinabove stated, it is my opinion that your first inquiry should be answered in the negative.

In my opinion your second inquiry should likewise be answered in the negative. Neither the seating capacity of "booths" with tables and benches or of a counter with stools, may be included in determining whether or not a restaurant has a seating capacity at tables and chairs, accommodating at least fifty (50) persons at one time. The pertinent provisions of Section 2 (o) of the Alabama Beverage Control Act are modeled after Article I, Section 2, of the Pennsylvania Liquor Control Act of 1935, which defines a restaurant as: "A reputable place, operated by responsible persons of good reputation, and habitually and principally used for the purpose of providing food for the public; the place to have an area within a building of not less than four hundred square feet, equipped with tables and chairs accommodating at least thirty persons at one time."

The Pennsylvania Act further provides:

"Section 3. (a). This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth, and to prohibit forever the open saloon; and all of the provisions of this Act shall be liberally construed for the accomplishment of this purpose."

Section 3, sub-section (a) of the Alabama Act is taken bodily from the Pennsylvania Act, supra. The Superior Court of Pennsylvania, Philadelphia District, in construing these sections, said:

"The method evidently adopted to accomplish their purpose was to confine the sale of intoxicating liquors to bona fide hotels, restaurants and clubs, and we must construe the act so as to accomplish this purpose, not necessarily by limiting the number of licenses, but by strictly confining them to legitimate eating places. * * * The sale of liquor is only incidental to the maintenance of a legitimate eating place as described in the Act."

In my opinion this language of the Pennsylvania Court is peculiarly applicable in determining the intent of the Alabama Legislature in the use of the phrase "Equipped with tables and chairs", especially when the avowed purpose of the whole Alabama Beverage Control Act is, as stated in the first clause of the title thereof, **"to promote temperance and suppress the evils of intemperance."** Patently, the legislature intended to remove the new alcoholic beverage control system as far from the old time bar and saloon as possible. The lawmakers wished to make certain that no bar at or over which alcoholic beverages were sold or served could be maintained in Alabama, as specifically evidenced by Section 16, supra, and wished to further insure against a return of the old saloon atmosphere, by restricting the sale of liquors by restaurants to persons seated at tables in chairs, and in full view of the other patrons of the restaurant and not in a closed or semi-closed place where it was difficult, if not virtually impossible, for the other patrons to see what was going on therein. Perhaps the lawmakers knew, as they no doubt did know, since it is a matter of common knowledge in this State, that most of the "booths" referred to in your letter of inquiry were a product of the prohibition era in Alabama, erected primarily as places where persons desiring to drink illegal and illicit alcoholic beverages could go and consume the same, either with or without food, without fear of being seen by the passing public, or by any, except possibly a very few, of the patrons who were in close proximity to the so-called "booths."

Be that as it may, the legislature certainly knew at the time it passed the Alabama Beverage Control Act that restaurants had at least three types of seating arrangements, that is, tables and chairs; counters with stools; and "booths" with tables and benches. The legislature, with this knowledge, saw fit, in its definition of a bona fide restaurant in which liquor could be sold, to use only the seating capacity of one type of these three different types of seating arrangements in arriving at the minimum seating capacity of such restaurant, namely: tables and chairs. It did not see fit to include therein the seating capacity of either counters with stools or "booths" with tables and benches. In my opinion, this clearly shows that the legislature did not intend that they be so included. If the legislature had intended that the seating capacity of such types of seating arrangements be included in arriving at the minimum seating capacity, would it not have said, instead of saying tables and chairs, as it did, tables with seats, or tables with chairs or benches or stools? Admittedly, chairs, benches and stools are seats, but a bench or stool is not a chair, any more than black is white, or red is blue.

As stated above, the legislature intended that the bar of other years be avoided at all odds in the new system. Section 16 of the Alabama Beverage Control Act provides in part:

"A hotel, club or restaurant licensee shall not maintain any counter or bar at or over which liquors, vinous or malt beverages are sold to guests, patrons, or members."

By the incorporation of the word "counter" in this section, the intention seems to have been to avoid not only the evil, but even the appearance of evil. Or, it may have occurred to the legislative mind that if the sale or service of liquors at or over counters was permitted, the ingenuity of the vendors would devise some arrangement which was in legal definition a counter, but, was, in fact, the old time bar in present day raiment.

In holding alcoholic beverages may not be sold or served in "booths" with tables and benches or at or over counters with stools and that the seating capacity of neither of such seating arrangements may be included in ar-

iving at the minimum seating capacity at tables and chairs, I am only giving effect to the clearly expressed intention of the legislature "to promote temperance and suppress the evils of intemperance."

To hold that liquor could be sold at or over a counter with stools or that the seating capacity of such a seating arrangement could be included in arriving at the minimum seating capacity at tables and chairs would certainly smack of the bar of yesteryear.

Likewise, to hold that liquor could be sold or served in "booths" with tables and benches or that the seating capacity of such a seating arrangement could be included in arriving at the minimum seating capacity at tables and chairs would tend to give to a restaurant in which such "booths" might be located a decided saloon-like atmosphere, whereas the act specifically provides that one of its main purposes shall be to prohibit forever the open saloon. See Section 3, sub-section (a), Section 10, and Section 28.

Therefore, it is my opinion that the seating capacity provided by "booths" with tables and benches and by a counter with stools cannot be included in arriving at the minimum seating capacity at tables and chairs, accommodating at least fifty (50) persons at one time, as required by sub-section (c) of Section 2, supra.

Your third inquiry has been answered in the negative as to both counters with stools and "booths" with benches and tables by the discussion, supra, of the other questions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 13, 1937

Hon. Q. D. Taylor, Sheriff
Marshall County,
Guntersville, Alabama.

1. The Chief Deputy Sheriff of Marshall County is appointed by the Sheriff and serves at his will, therefore, such Chief Deputy has no fixed term of office and his salary may be reduced or increased within the limits fixed by Section 10188, Code of Alabama, 1923.

2. The Jail guard of the County of Marshall is also appointed by the Sheriff and serves at his will, therefore, has no fixed term of office and his salary may be reduced or increased at any time the Board of Revenue of his County may see fit.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 23, 1936 in which you request my opinion as follows:

"I hand you herewith a certificate signed by the Chairman of the Board of Revenue which correctly states the facts as shown from Minutes of the Board of Revenue.

"I appointed Mr. E. M. Boyles Chief Deputy Sheriff of this County at a salary of \$125.00 per month. At that time the County was paying and had been since 1927, a monthly salary to the Chief Deputy of \$125.00 per month. No change had been made decreasing this amount. I appointed him for a four-year term to the duration of my tenure in office. They continued to pay this salary until the first day of November, 1935, at which time the Board of Revenue created by Special Act of the Legislature of 1935 in fixing the budget for the County allowed in the budget only \$75.00 and by this means attempted to cut his salary for \$125.00 to \$75.00 per month. Special Acts of the Legislature, 1936 created a new Board of Revenue. The new Board of Revenue restored by Resolution his salary to \$125.00 per month, which they have been paying from May 1st, and did by Minute Entry agree to pay back salaries in case they could legally do so.

"QUESTION: Can this back salary of six months be legally paid to Mr. Boyles under this state of facts, and the state of facts set forth in this Certificate of the Chairman of the Board of Revenue?

"For your further information, I talked to the Chairman of the Board of Revenue, Judge Williams, Probate Judge of Marshall County, and he told me to appoint Mr. Boyles at a salary of \$125.00 per month and I did so under that agreement at that time, and he was paid for nine months of his salary at that rate before they attempted to cut it. In that same conversation I had an agreement with the Probate Judge, who is Chairman of the Board of Revenue now and was then, that the salary of the Jail Guard would be \$75.00 per month, for the term of my office, and I appointed Mr. W. P. King, Jailor.

"The minutes of the Board of Revenue record this part of the agreement, as shown by the enclosed Certificate from the Chairman. He was paid the \$75.00 per month until November 1st, when the Board of Revenue in fixing a budget under the Lee bill allowed in the budget only \$50.00 per month for his services. He was then paid \$50.00 per month until May 1st, when his salary was then restored to him under the agreement shown by the Minutes if they could legally do so they would pay the back six months' of \$25.00 per month.

"All payments made to Mr. Boyles and Mr. King were accepted under protest and claims filed with the Board of Revenue each month for the full amount of their original salaries, and they were accepted under an agreement with the Board of Revenue and Mr. King and Mr. Boyles, that it was to be accepted without prejudice on their part, and without prejudice on the part of the Board of Revenue.

"QUESTION: Can these payments now be legally made to Mr. King for the back six months, in which he was only paid \$50.00 per month instead of \$75.00 as claimed to be due by him?"

Answering your request, I call your attention to Section 10188, Code of Alabama, 1923, which is as follows:

"10188. DEPUTIES.—In all counties of the State of Alabama which now have not more than two hundred thousand inhabitants according to the last federal census or which may hereafter have such population according to any federal census hereafter taken, in which the sheriff is not a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think proper, but the coroner of such county shall not be appointed a deputy. Said chief deputy shall

be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, board of revenue or other governing body of the county in which such chief deputy is appointed not less than nine hundred and not more than fifteen hundred dollars, payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or court of county commissioners of such county."

You will note from the above section that power to fix the salary of such chief deputy is lodged in the commissioner's court, Board of Revenue, or other like governing body of your county. The power of appointment of such deputy is lodged in the sheriff and the statute supra says: "Such" deputy serves at the will of the sheriff." This being true such deputy has no fixed term of office. *Touat vs. State ex rel, Callaghan*, 173 Ala. 453; *Cooper v. State ex rel, Hawkins*, 226 Ala. 288 *Roberts v. State ex rel, Bailey et al*, 228 Ala. 222; 99 A. L. R. p. 381 (Note).

I note you say you appointed Mr. Boyles, Chief Deputy for a term of four years and at the time the Board of Revenue of your County, fixed his salary at \$125.00 per month and he was paid this amount up to November 1, 1935, at which time the Board of Revenue reduced his salary, fixing it at \$75.00 per month; that this deputy drew this salary up to May 1, 1936, at which time the Board of Revenue placed his salary back to \$125.00 and offered to pay the difference between \$125.00 per month and \$75.00 per month from November 1, 1935, up to May 1, 1935.

You desire to know if this can be legally paid; my answer is in the negative. Even though you appointed such deputy at the beginning of your term for a term of four years could make no difference as he still served at your will and pleasure. I call your attention to 46 C. J. page 964, Section 98, which is as follows:

"98. INDEFINITE TENURE. Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no "Term" of office. A constitutional provision that terms of office not fixed by the constitution shall not exceed a specified time does not enlarge the duration of an office held at the pleasure of the executive."

Therefore, such deputy having no fixed term of office, but serving at the will of the sheriff was subject to the cut made by the Board of Revenue who was clothed with the power to fix his salary between certain limits, Section 10188 supra, but aside from all this, I think Section 68 of the Constitution of Alabama, 1901 definitely prohibits the very thing attempted to be done in this case. This section is as follows:

"The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employee, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio

services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners."

What I have said with reference to your chief deputy sheriff applies with equal force to your jail guard, Mr. W. P. King.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Hon. L. J. Lawson,
Treasurer, Hale County,
Greensboro, Alabama.

County Treasurer not liable for losses in cases where sinking funds of the county are invested in accordance with the direction of the governing body of the county and in compliance with Section 2294 (Sub-section 61) and Section 6755, (Sub-section 22), as amended, of Michie's Code.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

This is to acknowledge receipt of your letter of recent date, which is as follows:

"I am very anxious to get an opinion from your office in regard to a matter which has come up within the past thirty days.

"The Commissioners Court of Hale County has ordered me, as County Treasurer, to invest all sinking funds in United States bonds. Before doing this, I would like to know if my bondsman or I would be liable to the County in case there was a severe break in the bonds. These bonds at this time, are worth about 105. Should there be a break, the County would lose money. I think their action is wise but I must protect myself and my bonding company and I would appreciate it if you would give me an opinion on this just as soon as possible."

Section 2294 (Sub-section 61) and Section 6755 (Sub-section 22), Michie's Code of Alabama, provides as follows:

"2294 (61). SINKING FUNDS—All sinking funds provided for the retirement of bonds shall be invested in bonds of such sub-division, or in bonds of the United States of America, or in bonds of the state of Alabama, or in bonds of any county in the state of Alabama, or any municipal corporation of the state of Alabama, or deposited in bank on interest. All sinking funds created by resolution or ordinance heretofore adopted must be properly set aside each year in accordance with the resolution or ordinance provided for the same, and a report made thereof and filed with the clerk of the municipality or with the probate judge of the county, as the case may be, showing in detail how said sinking fund is invested or deposited. All contracts now in effect for purchasing savings certificates, under the law as it heretofore existed, shall continue as legal investments."

"6755. (22) To set aside such part of the revenue of the county as may be deemed expedient for the purpose of creating a sinking fund for the payment of bonds or other indebtedness, and to invest such sinking fund in such interest-bearing securities, or deposit the same on interest-bearing account, within the state, as said court may deem wise."

I am of the opinion that if a County Treasurer invests the sinking funds of the county in accordance with the direction of the governing body of the county in United States government bonds, he is not liable for any losses which the county might incur by virtue of a break in the bond market. He has merely acted in compliance with the direction of the governing body of the county, which direction was in full compliance with the authority vested in it by the Legislature.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Hon. Howard Kirby,
Clerk of the Circuit Court,
Etowah County,
Gadsden, Alabama.

Fine and Forfeiture Fund—ex officio Clerk of the County Court not entitled to file claims against fine and forfeiture fund for fees arising from proceedings under Section 5138, Code of Alabama, 1923.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of recent date which I quote as follows:

"Would I be entitled to file claim on Fine and Forfeiture Fund for fees in Breach of the Peace cases in County Court?"

If I may assume by your use of the words "Breach of the Peace cases" you refer to preventative proceedings instituted pursuant to the authority contained in Sec. 5138, Code of Alabama, 1923, it is my opinion your question should be answered in the negative.

A claim against the Fine and Forfeiture Fund of a County should be based upon costs accruing from the prosecution of an offense for which punishment may be inflicted and does not include a claim for costs arising from proceedings which in their nature are to restrain the commission of an offense.

Section 5138 "is a preventative measure which the magistrate is authorized to set in motion to restrain the defendant from the commission of an offense against personal property of another, and not a proceeding to try the person charged with the commission of a criminal offense." **Howard v. State**, 121 Ala. 21. 25 So. 1000. "To threaten an offense on the person or property of another is not an offense against the law for which a person may be punished. At most, he may be restrained from so doing by proper proceeding." **Howard v. State**, supra.

Very truly yours,
A. A. CHARMICHAEL,
Attorney General.

May 14, 1937.

Hon. J. S. VanValkenburg,
Chairman, Board of Commissioners,
Madison County,
Huntsville, Alabama.

Court of County Commissioners authorized to purchase land upon which to erect public buildings.

Purchase price may be provided for by issuance of interest bearing warrants payable out of 2.5 mill tax provided for in Section 215 of the Constitution of 1901.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of March 19, 1937, which is as follows:

"As Chairman of the Board of County Commissioners of Madison County, Alabama, I am directed to request of you the following opinion:

"1—Can the Board of County Commissioners of Madison County, Alabama, purchase real estate in the city of Huntsville, Alabama, for a necessary public building to house agencies of the county, such as the County Health Officer and his assistants, and the County Farm and Home Demonstration Agencies, for which there is not room in the present court house or public buildings of said county, and for which the county is now paying rent for offices or quarters outside of the court house or public buildings owned by the county?

"2—If your answer to the foregoing question is in the affirmative, then can the Board of County Commissioners issue interest bearing warrants for the purchase of such real estate to the grantor or seller thereof; such warrants to be payable from or with the special 2.5 mills tax for buildings, bridges and roads authorized under Sec. 215 of the Constitution of Alabama?"

It is my opinion that your first inquiry should be answered in the affirmative. Sections 212-219 of the Code of Alabama, 1923, provide for the erection of public buildings. These legislative mandates cannot be carried out unless the Court of County Commissioners has the power to purchase land upon which to erect such buildings.

I am of the opinion that your second inquiry should be answered in the affirmative. Section 215 of the Constitution of 1901 is as follows:

"Sec. 215. No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which

taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

In my judgment, the case of *Territory ex rel Overbaker et al v. Baxter*, 83 Pac. 709, is direct authority for the position here taken. The statutes of Oklahoma provided as follows:

"Whenever the Board of County Commissioners of any county in the territory of Oklahoma considers it to be to the best interest of the county to purchase or erect a courthouse or jail, they shall have power to contract for the purchase or erection of same, and to issue bonds in payment therefor."

The question was presented to the court as to whether the power to erect a courthouse or jail included the implied power to purchase a site upon which to erect a jail, and to issue bonds in payment therefor.

The Court held:

"It seems to us that the answer to the question is obvious. The power to erect a courthouse or jail implies the incidental power to **purchase a site for such purpose**. This implied power is essential and indispensable for the purpose of carrying into effect the express power conferred by the statute. In *DeWitt v. San Francisco*, 2 Cal. 289, it was held that the authority by act of the Legislature to erect a courthouse and jail, would necessarily embrace the power to **purchase the land** on which to erect them."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

License Schedule 16 Revenue Act 1935—Operator of filling station and garage must pay accessory license where stock exceeds value of \$75.00.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 22, 1937 in which you request my opinion as follows:

"A man operating a filling station and garage in connection with said filling station has procured license under Schedule 67 to sell gasoline and has procured license under Schedule 13 to repair automobiles has been cited by license inspector saying he is subject to a license under Schedule 16 claiming that this man has in stock about \$140 worth of accessories at wholesale value. Please see Schedule 16 which exempts him from accessory license for \$75 under Schedule 67 and \$75 under Schedule 13,, he having procured both of the above mentioned licenses. It

seems to me that his stock of accessories would have to exceed \$150 wholesale value before he would be liable to buy license under Schedule 16, Please give me an immediate reply."

In my opinion, the person described in your letter is subject to the license under Schedule 16. This Schedule requires a license on persons selling motor vehicle accessories, tires, etc.: "Provided regularly licensed filling stations or garages are not required to pay the above accessories license if their stock of accessories at any time does not exceed the wholesale value of \$75.00."

It is well settled that licensing statutes should be construed strictly against any exemptions. The exemption is not based on so much for a garage and so much for a filling station, but is based solely on the stock of accessories not exceeding the wholesale value of \$75. Since the stock in question exceeds \$75, the exemption does not apply.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Hon. L. J. Lewis,
Member County Commission,
Russell County,
Phenix City, Alabama.

A relative of a member of the Commissioner's Court may be employed to perform service to the County provided the member related takes no part in the appointment or fixing of salary.

Opinion by assistant Attorney General Haynes.

Dear Sir:

I have your request for opinion which I quote as follows:

"Under the provisions of the Local Act approved August 11, 1937, the Clerk of the Circuit Court was authorized to appoint a Deputy Clerk to be paid a salary, directly to him, in twelve monthly installments, for the purpose of keeping an Office at the County site or at the branch, as provided in said Act. This Act is found in the Local Acts of 1927 at pages 175 to 182 inclusive.

"The Act further provides that the Clerk of the Circuit Court shall certify such appointment of such Deputy Clerk to the County Commission or governing board of said County and thereupon the County Commission or governing board shall fix the salary of such Deputy Clerk at not exceeding \$100.00 per month.

The inquiry I want to make of you is whether a Deputy Clerk appointed by the Clerk of the Circuit Court under this Act can have his pay determined by the Board, of which I am a member, when such Clerk is my nephew?

"The reason I am making this inquiry is because of the provisions made in Section 5076 of the Code of Alabama of 1923, which prohi-

bits a Board Member making a contract with his relative in the fourth degree.

"This Deputy clerk files a claim each month for services rendered in accordance with his appointment by the Clerk of the Circuit Court. I, as a member of the Board, have nothing to do with his appointment and make no contract with him. I do have to vote upon the payment of his salary and if necessary, may be called upon to vote on an increase or decrease of his salary.

"Please advise me at your earliest convenience as to whether or not I have a right to vote upon the fixing of the salary of such Deputy Clerk, who is my nephew."

I think the Board of County Commissioners, may after your nephew has been certified to the Board by the Clerk of the Circuit Court, proceed to go ahead and fix his salary and approve same each month provided you do not sit when the matter is being considered.

I call your attention to an opinion of this office written to Hon. C. B. Burkett, Member, Court of County Commissioners, Houston County, Biennial Report of Attorney General, 1932-1934, page 190.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

Honorable Mack Kilcrease,
County Solicitor
Albertville, Alabama

License taxes imposed by Act No. 252, General Acts, 1935, p. 647, does not apply to amateur athletic performances specified in sub-section (d) thereof when held under auspices of educational institutions for promotion of education in Alabama.

Opinion by the Attorney General.

Dear Sir:

Reference is made to your request for an opinion which I quote as follows:

"I would like for you to give a ruling on House Bill 197 which appears on page 647 of the 1935 Acts of the Legislature, with special reference to sub-section "D". Provided, however, that nothing in this act shall be permitted, authorizing or enjoining the commission to collect any license, permit, fee, or tax for any amateur boxing, sparring, or wrestling. Exhibitions held under the auspices of educational institutions when the proceeds of this nature are to be used to foster, aid, or effect the program of education in the State of Alabama.

"What I want to know, is our school subject to fees and license charged under this bill for amateur performances where they are held for the benefit of the education programs."

It is my opinion that the athletic performances specified in sub-section (d), Act No. 252, General Acts of 1935, p. 647, held under the auspices of your school or any other educational institution in Alabama for the promotion of educational programs in this state are not subject to the

license taxes imposed by Act No. 252, supra, on like performances. An exemption from such license tax imposed by said Act is granted to educational institutions by subsection (d) of the Act provided the proceeds are used in the manner directed in said sub-section which I quote as follows:

"(d) to revoke any license or permit when, in its sound discretion, the public welfare requires it; provided, however, that nothing in this Act shall be construed as permitting, authorizing, or enjoining the Commission to collect any license, permit, fee, or tax for any amateur boxing, sparring, or wrestling matches or exhibitions held under the auspices of educational institutions when the proceeds of affairs of this nature are to be used to foster, aid, or abet programs of education in the State of Alabama. But no exemptions from license, permit, fee, tax, or charges will be granted to any person, group of persons, or organization when the proceeds or any part thereof of such amateur boxing, sparring, or wrestling matches or exhibitions are for personal or private gain. Reports of all such matches shall be made to the Boxing Commission within ten days thereafter, and upon such form and with such information as may be required by the Commission."

The exemption granted in the foregoing Act has no reference to exemption from payment of tax imposed by the Alabama Sales Tax Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Hon. Chas. W. Lee,
State Comptroller,
C A P I T O L.

1. When a judgment is obtained in the Circuit Court, it is the duty of the Clerk at all times to keep the Sheriff armed with a live execution.

2. If execution is issued against the plaintiff for the cost which accrued at his instance in obtaining his judgment and such execution is returned "no property found" this is no bar to the issuance of other executions against the plaintiff for the same purpose.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 24, 1937, in which you request my opinion as follows:

"1. Has a Circuit Clerk the authority to issue and have served alias executions against a defendant for costs or for judgment and costs without any instructions from the plaintiff and without any liability as to the expense of such alias executions on the plaintiffs part?

"2. In an instance where the costs were taxed against the defendant and execution against said defendant was returned 'No Property Found', and an execution had then been issued against the plaintiff for his costs and returned marked 'No Property Found,' would the Clerk then

have the authority to issue one or more alias executions against the plaintiff?"

Based on an opinion of this office written, March 16, 1937 to you as Comptroller, my answer to your two requests is in the affirmative. While the above opinion does not exactly answer the question you have here, yet in a general way it does. Certainly as to your first request. It is the duty of the clerk, whenever there is a judgment in his court unsatisfied to keep the sheriff armed with a live execution at all times, so that that at any time an opportunity presents itself he may be able by levying to collect the judgment on which the execution is based.

As to your second question, I am sure you have in mind an execution issued under Section 7805, Code of Alabama, 1923, which is as follows:

"When against plaintiff for his costs,—when execution against the defendant is returned 'no property found,' execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

It is my opinion that if, under Section 7805 supra, an execution is issued against the plaintiff for the costs which accrued at his instance in obtaining his judgment and is returned by the sheriff "no property found" alias execution can be issued at any time after the return of the first. In other words the issuance and return of the first execution "no property found" could not work a bar to future issuance of executions for the same purpose. See Report of Attorney General, 1922-24, page 302.

However, there are some exceptions to the above rule as is noted in Section 7795, 7799, Code of Alabama, 1923 and of course, the Judge of the Circuit Court or any other court with like jurisdiction and powers may by proper order entered stay the issuance of such an execution for a limited time. This to be in the sound discretion of the Judge making the order.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Dr. J. A. Keller, Superintendent,
Department of Education,
Montgomery, Alabama.

Alabama Sales Tax—Exemptions of gross receipts derived from sales to city and county boards of education.

Gross receipts derived from sales of automobile trucks, chassis, and of bodies therefor, accessories, parts and equipment to city and county boards of education for lawful purposes are exempt.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of recent date which I quote as follows:

"Many requests are still coming to this office concerning the interpretation of the opinion rendered on April 14, 1937, in relation to the payment of the sales tax by boards of education. This opinion deals

with the application of the sales tax to certain specific purchases by board of education. School boards purchase many articles not referred to in your opinion. Therefore, I am requesting your opinion concerning the following questions:

"1. Are the gross receipts derived from the sales of automobile trucks or chassis and of bodies therefor to county and city boards of education to be used lawfully in the transportation of children to and from schools exempt from the tax imposed by the Chichester Act (Act No. 179, approved February 23, 1937)?

"2. Are the gross receipts derived from the sales of accessories, parts, and other equipment to county and city boards of education for repair, maintenance, and operation of school busses owned by said boards and used to transport children to and from school pursuant to the laws of Alabama, exempt from the tax imposed by said Chichester Act?"

It is my opinion that both of your questions should be answered in the affirmative. The operation of elementary and high schools in the State of Alabama is a State function. *The State vs. County of Tuscaloosa (M.S.)* The Sales Tax Act specifically exempts receipts derived from sales to the State of Alabama. Section 2 sub-section (f). County Boards of Education are mere agencies of State in the operation of elementary and high schools. *The State v. County of Tuscaloosa, supra.*

It is my opinion that the gross receipts derived from the sale of the articles mentioned in your aforementioned inquiry are exempt, as such exemption obtains for the same reasons as those exemptions which I mentioned in my letter to you of April 14, 1937. The principles of law sustaining the exemption are the same and they arise out of the same specific exemption provided in the Sales Tax Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 15, 1937

Board of Revenue,
Conecuh County,
Evergreen, Alabama.

1. A person holding a Federal office cannot qualify to hold a state office as long as he holds said Federal position.

2. A person that is a member of the City Council or County Board of Welfare which do not pay a salary or other compensation is not holding an office of profit under the laws of Alabama.

Opinion by Assistant Attorney General Haynes.

Gentlemen:

I have your letter of March 31, 1937, in which you request my opinion as follows:

"The Board of Revenue of Conecuh County, myself as Chairman of such Board, and Hon. J. T. Galliard, the new member of the Board of

Revenue recently elected, desire your opinion on the following proposition.

"1st.—Recently Hon. J. T. Galliard, under Local Laws of Conecuh County, was elected during the year 1937 as a Member of the Board of Revenue of Conecuh County, Ala., and during the last thirty days or more. He has made bond, his bond has been approved and filed in the Probate Office of said County as such member of the Board, and the Board desires him to sit with the Board at its next regular session on April 12th, 1937;

"2nd.—However, before he was elected a member of the Board of Revenue, Mr. Galliard was and is now a member of the City Council of the City of Evergreen, Ala.; he was heretofore elected and is serving as Chairman of the County Board of Welfare; and he is also a United States Commissioner.

"3rd.—Mr. Galliard receives no compensation whatsoever as a Member of the City Council of Evergreen; it is not an office of profit; he receives no compensation as member of the Board of Child Welfare, it is not an office of profit; he does receive fees, etc. as United States Commissioner of Conecuh County and possibly Escambia County, and one of his duties is to bind over to the Federal Grand Jury persons charged with offenses against the Federal Government.

"4th.—Under these circumstances, which of these offices are now lawfully held by Mr. Galliard at this time under the Constitution and Laws of Alabama.

"5th.—Does the acceptance by Mr. Galliard of the office of Member of the Board of Revenue of said County, of itself vacate all other offices held by him that are forbidden by the Constitution and Laws of Alabama.

"6th.—Will it be necessary for him to resign any of said other offices before he takes his seat as a member of the Board of Revenue.

"7th.—Is Mr. Galliard a lawful and valid member of the Board of Revenue of Conecuh County, Ala., and which of these other offices now held by him are lawfully and validly held.

"8th.—Are any of said offices now held by Mr. Galliard unlawfully held, and please name which are these offices."

It is my opinion Mr. Galliard cannot qualify as a member of the Board of Revenue of your County as long as he holds the office of United States Commissioner. I call attention to Section 280 of the Constitution of Alabama of 1901, which is as follows:

"Sec. 280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

In the case of *Shepherd v. Sartain*, 185 Ala. 439 (64 So. 57) we have the following:

"One holding an office under the United States Government may be elected to a state office, the only requirement being that he cannot qualify for the state office unless he resigns the Federal office."

Now as to the other positions you say Mr. Galliard is holding, viz: Member of the City Council and Member of the County Board of Welfare, you say neither of these positions carry any compensation, therefore, I do not think it can be said that they are offices of profit and therefore do not come under the ban of Section 280 of the Constitution, supra. I think this answers each and every question you ask.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 15, 1937

Hon. D. E. Dunn,
Assistant Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. A wholesale distributor of malt or brewed beverages granted a license for a particular place in Alabama may establish and maintain such warehouses at other places in the State of Alabama for the storage of malt or brewed beverages as may be approved by the Board, and may load his truck in the vicinity of such warehouse or warehouses with the stock there stored, and from said trucks sell and deliver the same to licensed retail dispensers, at their places of business.

(a) The manner in which sales and deliveries of malt or brewed beverages are made and all records appertaining thereto should be in accordance with the rules and regulations promulgated by the Alabama Alcoholic Beverage Control Board in regard to the same.

(b) No sale of malt or brewed beverages can be made from warehouses themselves, the same being for the purpose of storage only.

2. A wholesale distributor of malt or brewed beverages maintaining a warehouse for storage, pursuant to permits granted for the same by the Board, from which trucks are loaded for the purpose of sale or delivery to licensed retail dispensers, held not liable for a wholesale distributor's license for maintaining such warehouse.

3. No person, firm or corporation can be issued more than one wholesale distributor's license.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 31, 1937, which follows:

"I am writing you at this time to request that you please interpret for me sub-section 2 of Section C, page 30, of the Alabama Bev-

erage Control Act passed by the Legislature of Alabama February 2, 1937. Section 2 is as follows:

"No person shall possess or be issued more than one distributors' or wholesalers' license. No distributor or wholesaler shall maintain or operate any place where sales are made other than that for which the license is granted. No distributor or wholesaler shall maintain any place for the storage of malt or brewed beverages unless the same has been approved by the Board. No distributor's or wholesaler's license shall be issued for any premises in any part of which there is operated any retail license for the sale of liquor, vinous or malt or brewed beverages."

"You will note that Section 2 specifically states that no distributor or wholesaler shall maintain or operate any place where sales are made other than that for which the license is granted. However, Section 2 delegates authority to the Board to issue permits for the storing of alcoholic beverages by licensed wholesale dealers at places other than that for which the license was issued. Now, the last sentence in Section 2, page 27, states that the license issued to a wholesale distributor of malt or brewed beverages shall authorize to the holder thereof to sell or deliver vinous or malt or brewed beverages in sealed containers anywhere within the State of Alabama."

"Question 1. Can a licensed wholesale distributor licensed to do business, for instance in the City of Montgomery, maintain and establish a warehouse under a permit by the Board for the storing of malt or brewed beverages in Gadsden, Alabama, and have his trucks in that vicinity to load on malt or brewed beverages from said warehouse in Gadsden and sell and distribute same to the retail licensees in that district?"

"Question 2. If said wholesale licensed distributor of malt or brewed beverages should load on his trucks malt or brewed beverages from a warehouse for which he has been granted a permit for storage and sold and distributed same to the retail licensed dealers of such beverages, would he not be liable for a wholesale distributor's license?"

"Question 3. Can more than one distributors' or wholesalers' license for malt or brewed beverages be issued to one person?"

In my opinion, your first question must be answered in the affirmative.

Sub-section (g) of Section 2 of the Alabama Beverage Control Act provides:

" 'Wholesaler, distributor and/or Jobber,' means and includes any person licensed by the Board to engage in the sale and distribution within this State, at wholesale only, malt or brewed beverages of an alcoholic content not in excess of four (4%) per cent by weight and five (5%) per cent by volume, to be sold only to licensed dealers as defined in this Act."

Sub-section 2 of Section 19 of the Act reads as follows:

"The Board shall issue to any reputable person who applies therefor, pays the license fee hereinafter prescribed, a distributor's or wholesaler's license for the place which such person desires to maintain for the sale of vinous and malt or brewed beverages not for consumption on the premises where sold and in original packages as prepared for the market by the manufacturer. Such licenses shall be issued on-

ly to reputable individuals, partnerships and associations who are, or whose members are, citizens of the United States, or to reputable corporations organized or duly registered under the laws of the State of Alabama. Such licenses shall be issued to corporations duly organized or registered under the laws of the State of Alabama only when it appears that all of the officers and directors of the corporation are citizens of the United States, and that at least fifty-one per centum of the capital stock of such corporation is actually owned by individuals who are citizens of the United States. **Such license shall authorize the holder thereof to sell or deliver vinous or malt or brewed beverages in sealed containers anywhere within the State of Alabama.**" (Emphasis ours).

Sub-paragraph (2) of Sub-section (c) of Section 21 of said Act reads as follows:

"No person shall possess or be issued more than one distributors' or wholesalers' license. No distributor or wholesaler shall maintain or operate any place where sales are made other than that for which the license is granted. No distributor or wholesaler shall maintain any place for the storage of malt or brewed beverages unless the same has been approved by the Board. No distributor's or wholesaler's license shall be issued for any premises in any part of which there is operated any retail license for the sale of liquor, vinous or malt or brewed beverages." (Emphasis ours)

It will be noted from the above quoted provisions that (1) A wholesaler distributor's license entitles the holder thereof to sell or deliver malt or brewed beverages anywhere within the State (the same meaning, of course, anywhere in the State that such business is legal) to licensed retail dispensers, (2) That only one such license may be issued to one person, firm or corporation, (3) That the holder of such license cannot maintain or operate any place where sales are made other than the place for which the license is granted, and (4) That a wholesale distributor may maintain such warehouses for the storage of malt or brewed beverages as may be approved by the Board.

Therefore, it is my opinion that a wholesaler distributor of malt or brewed beverages granted a license for a particular place in Alabama may establish and maintain such warehouses at other places in the State of Alabama for the storage of malt or brewed beverages as may be approved by the Board, and may load his trucks in the vicinity of such warehouse or warehouses with the stock there stored, and from said trucks sell and deliver the same to licensed retail dispensers, at their places of business. However, the manner in which sales and deliveries of malt or brewed beverages are made and all records appertaining thereto should be in accordance with the rules and regulations promulgated by the Alabama Alcoholic Beverage Control Board in regard to the same. See sub-section (9) of Section 24 of the Act. No sales of malt or brewed beverages may be made from such warehouses themselves, the same being for the purpose of storage only.

In my opinion, your second question should be answered in the negative. You will note from the above quoted provisions of Sub-paragraph (2) of Sub-section (c) of Section 21 that no person, firm or corporation should possess or be issued more than one wholesale distributor's license. As I have hereinabove held, in answer to your first question, such warehouses for the purpose of storage as may be approved by the Board may be established and maintained by a wholesale distributor. However, these warehouses, as above shown, are for the purpose of storage only, and not for the purpose of sale.

Your third inquiry must likewise be answered in the negative. I have already pointed out but will here again set out the provisions of the Act which prohibit the issuance of more than one wholesale distributor's license to one person, firm or corporation.

It is the first sentence of Sub-paragraph (2) of Sub-section (c) of Section 21, which reads as follows:

"No person shall possess or be issued more than one distributor's or wholesaler's license."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 15, 1937

Honorable J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama

License Schedule 35 does not cover hat cleaning for which license is required under Schedule 70.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 22, 1937, in which you request my opinion as follows:

"A man has procured a license under Schedule 35 to do a cleaning and pressing business where **wearing apparel** is cleaned or pressed. He cleans a few hats which is a wearing apparel. The license inspector has cited this man and says he is subject to license under Schedule 70. I contend that he is not subject to license under Schedule 70 as his license which he has under Schedule 35 covers cleaning and pressing of **wearing apparel**. Please give me your opinion immediately."

In my opinion, this question is one of fact. It is true that "hats" has been construed to be covered by the definition "wearing apparel". 1 Words & Phrases 7425, *Wanamaker v. Cooper*, 96 Fed. 465.

You will notice that the license required by Schedule 35 is for operating "what is commonly known as a cleaning or pressing business" while Schedule 70 is for conducting "what is commonly known as a hat cleaning establishment".

In reply to your question, therefore, in my opinion if the person in question is operating "what is commonly known as a hat cleaning establishment", he should pay the license levied by schedule 70, regardless of whether he has paid a license under Schedule 35. If he is not operating "what is commonly known as a hat cleaning establishment", he is not liable for the license under Schedule 70. The mere fact that the licensee mentioned in your inquiry cleans a few hats in connection with his cleaning and pressing business does not subject him to payment of license under Schedule 70, *supra*.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 15, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Local Act—1935, No. 232, Page 131—Walker County.

Act, *supra*, does not authorize members of Board of Revenue an expense allowance.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"On July 31, 1935, the Legislature passed a Local Act abolishing the Commissioners Court and establishing a Board of Revenue in Walker County. This Act sets the salary of the Chairman and members of the Board and describes their duties. (Local Acts 1935, page 131 to 135.)

On November 29, 1935 the Board of Revenue by resolution placed upon the Minutes, made an additional allowance of an amount not exceeding \$30.00 per month expenses for gasoline and oil used by the members while inspecting roads in the County.

Has the Board of Revenue a legal right under this Act to grant and allow expenses in addition to the compensation set by the Act?"

It is my opinion that the question propounded in the last paragraph of the foregoing letter should be answered in the negative. The Act, *supra*, creating the Board of Revenue, provides for a fixed salary to be paid the members of the Board of Revenue, but does not authorize payment of an expense allowance.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 15, 1937

Hon. Bart B. Chamberlain,
Circuit Solicitor,
Mobile County,
Mobile, Alabama.

Alabama Sales Tax Act No. 126—

1. Liability of merchant for collection and remittance of tax not conditioned upon the State circulating tokens for payment thereof.

2. Gross Revenues received from interstate sale and shipment of merchandise is exempt from payment of the tax.

3. Gross receipts received from intrastate sale of taxed articles of merchandise are not exempt from payment of the tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"I am making this request for an opinion on the following points raised under House Bill No. 179 by Mr. Chichester: 'Alabama Luxury Tax Act'. I have requested the Hon. Bart B. Chamberlain, of this city, to join with me in this request for your opinion and he is signing this letter with me.

"Please advise us on the following points:

"1. The act begins its operation in Mobile County today. Through no fault of many of the merchants who make sales subject to the provisions of the act, no tokens have been provided to cover such sales. Section 26 of the act expressly provides for the issuance of such tokens. Is the merchant responsible for the tax?

"2. Assume that a non-resident of the State of Alabama writes a merchant in the State of Alabama asking that a shipment of certain goods be made from, for example, a merchant in Mobile to a purchaser in Pensacola. It would appear clear under such circumstances that no such sales tax would be imposed upon this transaction inasmuch as it would seem clear the transaction is one subject to the control and regulation of the United States rather than the State of Alabama. It is our belief any attempt to impose a tax would violate the clause of the Constitution relating to interstate commerce but we want your opinion on that point.

"3. Assume that a non-resident of the State of Alabama comes into the State and makes a purchase while here and directs the dealer to forward the article purchased by him to the State of his residence. Under such circumstances, must a tax be collected by the retail dealer selling the goods in the State of Alabama.

"4. It has been brought to our attention that in some states (among other, California) a non-resident of a state where a sales tax is imposed may make a purchase and give a certificate or affidavit to the effect that he is a non-resident and direct shipment of the goods purchased to him in the State of his residence and under such circumstances no tax is imposed. Could this be practiced in the State of Alabama if this method of handling a transaction is not expressly provided for by legislative enactment.

"Your opinion touching on these several points are of vital importance to the merchants of this community and we believe to the merchants of the State of Alabama generally. May we request that you let us have the benefit of your opinion at your very earliest convenience."

It is my opinion that the failure of the State of Alabama to supply tokens for payment of the tax does not excuse collection and payment of the tax. The tokens are supplied to facilitate collection of the tax. I am unable to find any provision in the Act which makes collection and payment of the tax dependent upon these tokens being supplied.

It is my opinion that the transaction set forth in paragraph numbered 2 of your letter, constitutes interstate commerce and is therefore tax exempt. Section 2 (f) of the Chichester Act reads as follows:

"There shall be excepted from the gross receipts of sale so as not to be taxed so much thereof as is derived from business conducted in commerce between this State and other States of the United States ***".

Bearing on the question of interstate and intrastate commerce, I quote from 12 C. J. page 26, paragraph 25, as follows:

"Section 25. Sale and Traffic in Goods—In General. That intercourse between citizens and inhabitants of different states which constitutes interstate commerce, and which is subject to federal, but not to state, regulation, includes not only transportation of persons and property, but also the purchase, sale and exchange of commodities, the very purpose and motive of that branch of commerce which consists in transportation being that other and consequent act of commerce which consists in the sale or exchange of the commodities transported. Delivery to the purchaser of goods in another state is an inherent and essential part of the intercourse defined by the word 'commerce'; and it is a general rule that a sale is a transaction of interstate commerce, subject to federal regulation but free from state laws consisting of taxation, foreign corporation, or other regulatory measures, where transportation of the subject matter of the sale from one state to another is essential to delivery to the purchaser and the consequent completion or performance of the contract of sale. The interstate features of the transaction are not destroyed by the fact that two separate shipments are combined in the state of delivery as an incident to delivery. To make a sale of goods interstate commerce, it is necessary that interstate transportation of the goods be involved, the fact that the goods sold are outside the state, or that the seller and the buyer are non-resident, not being sufficient. ****"

"A completed contract of sale between residents of a state is not a transaction of interstate commerce, nor is a contract between citizens of different states, when the contract is made and delivery accepted in the state where the property is situated, although the buyer intends to ship the property outside the state."

The Supreme Court of Alabama has defined interstate commerce in the following cases: *E. A. Foy & Co v. Haddock*, 191 Ala. 101; *Lee v. Town of LaFayette*, 153 Ala. 675; *Culverson v. American Trust & Banking Co.*, 107 Ala. 457.

If I may assume from your letter that the sale was completed in Alabama, it is my opinion that question 3 of your inquiry should be answered in the affirmative. The sale is intrastate commerce and is subject to the tax. *Ex Parte Conecuh Pine Lumber Company*, 180 Federal Report, 249 *Bruner v. Mobile Gulfport Lumber Company*, 188 Ala. 248, 66 So. 438. A sale is completed when title to the merchandise passes to the purchaser, even though the purchase price has not been paid nor delivery of the merchandise made. *McCray v. Young*, 43 Ala. 62; *Rolfe v. Huntsville Lumber Company*, 62 So. 537; 8 Ala. App. 487; *Southern States Company v. Long*, 73 So. 148, 15 Fed. 286. A completed sale is to be distinguished from an incomplete sale. The former supports an action based on title and the latter supports an action seeking damages for breach of a contract. Therefore, if the sale is completed after March 1, 1937, it becomes subject to the tax.

I know no law in Alabama which authorizes a non-resident of this state to make an affidavit of such non-resident and thus obtain an exemption from the payment of tax on merchandise, the sale of which is completed in Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 15, 1937

Hon. Wm. O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Club Licenses—

No necessity for maintaining regular dining room or kitchen, where otherwise qualified, provided space is maintained where food is habitually served as prerequisite to issuance of license.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 12, 1937 in which you request my opinion as follows:

"A 'Club' as defined in Section 2 (f) has applied to the Alabama Alcoholic Beverage Control Board for two club liquor licenses, one covering its clubhouse which is in all respects qualified, and the other covering leased rooms, located in a hotel several miles from the clubhouse. Covering this latter location, the Alabama State Department of Health inspection report has the notation "No regular dining room or kitchen. Space provided with three or four tables where meals are brought from restaurants."

"Question: Under the provisions of the Alabama Beverage Control Act, may the Alabama Alcoholic Beverage Control Board issue a Club Liquor License to a club, in all respects otherwise qualified, for its branch quarters apart from its clubhouse, where there is no regular dining room or kitchen?"

In your inquiry you state that the club which has applied for the Club Liquor License maintains a Clubhouse which is in all respects qualified and that in addition thereto it maintains leased rooms located in a hotel several miles from the clubhouse.

In answering your inquiry, I assume that the branch quarters apart from the clubhouse are in all respects qualified under Section 2 (f) of the Alabama Beverage Control Act with the exception of the question concerning which there is some doubt, i. e., that it has "no regular dining room or kitchen". I further understand from your letter that this branch of the club has a space provided where meals are brought from restaurants and regularly or habitually served to the members of the club.

Recourse to the Alabama Beverage Control Act reveals that sales of liquor by clubs are spoken of in three different sections:

Section 2 (f), wherein the term "club" is defined; Section 11 (c), dealing with the issuance of club licenses; and Section 16, wherein the sales of liquor in the club are specifically regulated.

Section 2 (f) supra, defines a "club" as:

" a corporation or association organized or formed in good faith by authority of law, and which must have at least one hundred fifty (150) paid up members. It must be the owner, lessee or occupant of an establishment operated 'solely for the objects of a national, social, patriotic, political, or athletic nature, or the like, but not pecuniary gain, and the property as well as the advantages of which belong to all the members and which maintains an establishment provided with

special space and accomodations where in consideration of payment, food with or without lodging is habitually served.' The club shall hold regular meetings, continue its business through officers regularly elected, admit members by written application, investigation and ballot and charge and collect dues from elected members." (Emphasis ours.)

Section 11 (c) provides that upon the receipt of application, proper fees etc., the board shall grant to the applicant for a club liquor license a liquor license entitling him to sell liquors, as defined in the act, in that part "habitually used for the serving of meals" to members.

Section 16 states that every club licensee may sell liquors "only in that part of the club *** habitually used for serving of food to guests or patrons."

Thus, we see, from an examination of the Act, that it was the intention of the legislature that the sale or service of liquor by clubs be allowed where the club maintains a space where "in consideration of payment, food with or without lodging is habitually served."

In your request for opinion you state that no regular "dining room" is maintained. A "dining room" is defined in Webster's New International Dictionary, 2nd Edition as "A room used or chiefly used for the taking of dinner and other meals". As noted above all that the Alabama Beverage Control Act requires is that food be habitually served on the club premises in a space maintained for that purpose. Nothing is said about the maintenance of a "dining room".

The above argument is equally applicable to the presence of a "kitchen" on the premises. A "kitchen" is defined by the above source as "A cook room; a room or part of an establishment appropriated to cookery". The act does not require as a prerequisite to the issuance of a club liquor license that such a cookroom or kitchen be maintained on the premises. But, as hereinabove stated, it only requires that space be provided where food is habitually served in consideration of payment.

From your inquiry it appears that the club in question does in fact maintain such a space for the serving of food, for Webster's New International Dictionary, 2d Edition defines "serve", in connection with "the serving of food", as "to place food on the table".

Thus, if qualified in all other particulars, the club mentioned in your inquiry may properly receive the liquor licenses regardless of the fact that no regular dining room or kitchen as hereinabove defined is provided.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 18, 1937

Hon. Ernest L. McClure,
Clerk Circuit Court,
Lauderdale County,
Florence, Alabama.

Solicitor's Fees—Costs properly taxed at \$10.00 where defendant pleads guilty to attempt to transport more than five gallons of whiskey.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 14, 1937, in which you request my opinion as follows:

"The case of State of Alabama vs. John Doe is now pending in the Circuit Court of Lauderdale County, Alabama, wherein the defendant is charged with transporting more than 5 gallons of whiskey, contrary to law. The Solicitor who prosecutes for the State and the defendant have agreed that the defendant may plead guilty to an attempt to transport whiskey. In this event, should the Solicitor's fee to be charged a part of the Court costs be \$30 or \$10? I will greatly appreciate it if you will advise me.

In my opinion, the proper Solicitor's fee to charge on conviction of an attempt to transport whiskey is \$10.00 and is covered by that part of the Schedule in Section 3738 which reads as follows: "For each conviction of a misdemeanor, not otherwise provided for—\$10.00".

Section 3307 of the Code of Alabama of 1923 authorizes a conviction for an attempt to commit an offense charged where the evidence so warrants. As a general rule, an attempt to commit a crime is a misdemeanor, whether the crime attempted is a felony or misdemeanor, and whether an offense at common law under the statute, see 16 C. J., Section 90, page 111, and many cases cited in note 91. *Cochran vs. State*. 203 Ala. 513, 34 So. 743.

Therefore, inasmuch as the defendant pleads guilty, under the facts detailed by you, to an attempt to transport whiskey, although the transportation of whiskey in an amount of more than 5 gallons is a felony, the attempt to commit this offense is a misdemeanor and in my opinion the Solicitor's fee will accordingly be \$10.00. Biennial Report, 1926-28 page 520, 522.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 18, 1937

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Taxation—Appeal and Supersedeas Bond, Section 78, Revenue Act, 1935.

Execution and approval of supersedeas bond, Section 78, supra, suspends foreclosure for ad valorem taxes secured by the bond.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date, which I quote as follows:

"I have a number of tax accounts on my books for 1936 tax that were appealed to the Circuit court from the values fixed by the Board

of Review, and supersedeas bonds filed as provided in Section 78 of the 1935 Revenue bill.

"On March 1 I certified these cases as delinquent to the Probate Court and the tax payers have raised the question that for the reason of the filing of the supersedeas bond in the Circuit Court upon making the appeal from the Board of Review that I am stopped from further action in the matter of enforcing the collection of such account by advertising and selling the property.

"Please give me your opinion as to whether or not I should certify to the Probate Court such accounts as delinquents. In the event your opinion in the above matter is an affirmative one and in the event the Probate Court issues a decree directing me to proceed with the sale, will it not be necessary for the tax payer, if he wishes to appeal from the decree to the Circuit Court, to file another supersedeas bond even though he has filed such bond at the time of making his appeal?"

It is my opinion that the execution and approval of a supersedeas bond, pursuant to Section 78, Revenue Act of Alabama, 1935, suspends the lawful right of the tax collector to foreclose a lien of the State for taxes secured by the supersedeas bond pending the determination of the appeal.

Section 78 reads in part as follows:

"When an appeal is taken the taxpayer shall pay the taxes due as fixed for assessment for the preceding tax year, before the same becomes delinquent, and upon failure to do so, the court upon motion ex mero motu must dismiss the appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the clerk of the Circuit Court in double the amount of taxes payable to the State of Alabama, conditioned to pay all taxes, interest and costs due the State, or any agency or subdivision thereof."

The aforementioned provision for execution and approval of a supersedeas bond appears for the first time as a part of the laws of Alabama. The purpose of this provision in my judgment is to authorize security for taxes in litigation and to suspend foreclosure of the lien. The provision specifically provides that the bond shall be in double the amount of the taxes payable to the State of Alabama, conditioned to pay all interest, taxes, and costs due the State, county or any agency or subdivision thereof. I pretermit and discussion of a question as to whether the execution and approval of the supersedeas bond destroys the lien of the State for the taxes secured.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 18, 1937

Hon. J. F. Anderson,
Clerk, Circuit Court,
Randolph County,
Wedowee, Alabama.

Fees: Sheriff is entitled to receive a fee of \$1.50 for serving a copy of interrogatories on the adverse party, and making his return, as provided by Sections 7764 and 7765 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter in which you state:

"Question of cost has been raised to me as Clerk of the Circuit Court of Randolph County, Alabama:

"The question follows: Interrogatories were filed in the Circuit Court under 1923 Code Sections 7764 et sequitur:

"These interrogatories were served on the adverse party by the Sheriff: What fee, and in what amount was the Sheriff entitled for serving a copy of said interrogatories on the said adverse party, and making his return thereon."

It is my opinion that the sheriff is entitled to receive a fee of \$1.50 for serving the interrogatories on the adverse party, and making his return.

I wish to call your attention to a part of Section 7287 of the 1923 Code of Alabama, which is as follows:

"7287. Fees allowed to sheriffs.—Sheriffs are entitled to receive the following fees for the following services: ***

"Serving summons and other mesne process, and returning the same \$1.50".

In my opinion, when the sheriff serves a copy of the interrogatories, he is in fact serving a summons on the party to come in and answer the questions propounded in the interrogatories.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 21, 1937

Hon. J. B. King,
County Superintendent of Education,
Autauga County,
Prattville, Alabama.

Schools—Endowment fund given by will for payment of teachers' salaries cannot be used for transporting pupils. The will cannot be changed after death of testator.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 30, 1937, which is as follows:

"I have just had a talk with Mr. R. E. Charlton, Chairman of the Board of Trustees of Hicks Memorial School, Autaugaville, Alabama, with reference to the seventeen thousand dollar endowment fund given by Mr. T. J. Hicks. Due to shortage of funds our schools are having to close on next Wednesday and with the interest from this endow-

ment fund Hicks Memorial school could continue on for another month if it were possible to apply some of the money on transportation.

"The money as specified in the will is for teachers' salaries but since the transported pupils constitute such a large part of the school it is hardly worth while to operate longer if the ones coming in from the rural section do not have transportation provided. Mr. Hicks is willing for a part of this money to be used for transportation purposes in this emergency and will make such changes as you may direct if any changes are required in the will to make it possible to use a certain amount for transportation.

"I shall appreciate having you render an opinion as to whether or not we may use some of the money received under this will for transportation. Since transportation is a large factor in operating a consolidated school, such as Hicks Memorial, transportation funds are just as essential as money for instruction and we shall be glad to know if the money may be so used."

In answer to your inquiry, I am of the opinion that the endowment fund left by the will for the specific purpose of "paying teachers' salaries" cannot be used for "transporting pupils." The fund was left for a specific purpose and cannot be used otherwise. The term "paying teachers' salaries" could not, in my judgement, by any strength of the imagination, be construed to conclude "transporting pupils".

You state in your letter that Mr. Hicks is willing to make any change in the will that is necessary. I presume by this that you do not mean the Mr. Hicks that is deceased but another Mr. Hicks. A will cannot be changed after the death of the testator. This is true whether it be a single will or a joint or mutual will. If it be a joint or mutual will and one of the testators has died such could not be changed by the other.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 22, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

1. Where a Justice of the Peace issues a warrant returnable before him for an offense for which he has jurisdiction, he should endorse the amount of bond required on the warrant and if the defendant is unable to make the bond when arrested he should carry him before the Justice of the Peace and procure a mittimus committing him to jail until he does make such bond.

2. Where a Justice of the Peace sits as a Committing Magistrate and binds party over to wait action of the Grand Jury on the case, he should issue a mittimus to the Sheriff to confine the defendant in jail.

3. Where the Examiner of Accounts failed to find such mittimus or orders on file in the sheriff's office, but where the jail book shows that the defendant was placed in jail on a certain day and released on a certain day, the sheriff should be paid for feeding such

prisoner regardless of whether he has on file the mittimus required under Section 4804, Code of Alabama, 1923, or not.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 5, 1937 in which you request my opinion as follows:

"1. Is there any authority for the Sheriff confining a person in jail on a warrant of a Justice of the Peace in a misdemeanor case without the person having been brought before the Justice of the Peace and a mittimus duly issued to the Sheriff for commitment to jail?

"2. In felony cases is it not mandatory for the Sheriff to have on file, in his office, mittimus or commitment papers for each person committed to jail?

"3. During the course of an examination of the Sheriff's Feeding Account the Examiner finds that proper commitment has not been issued and is not on file in accordance to Section 4804, shall not the Examiner call on the Sheriff's official bond to the State of Alabama for a refund of monies collected for feeding such prisoners?"

My answer to your first request is in the negative. When a warrant is issued by the Justice of the Peace for minor offense of which he has jurisdiction, he should make the warrant returnable to some set date and should endorse on the warrant the amount of bail required of the defendant. In other words, the Justice of the Peace should set the bond. Then, when the defendant is arrested, the sheriff or constable making the arrest, if the defendant can make bond in the amount set by the Justice, the officer making the arrest should release him. But, in case he cannot make such bond, then it is the duty of the officer making the arrest to take the defendant before the Justice and procure from him an order committing the defendant to jail to wait trial unless in the meantime he makes bond for his appearance on the day set for trial. You will note under Section 5221 of the Code of Alabama, 1923, the form for warrant of arrest by Justice of the Peace is set out and such warrant says nothing about committing to jail, but simply says bring him before me. But, if the Justice on issuing the warrant sets the amount of bail to be required, then the defendant could be released on making such bond returnable on the day the case is made returnable. It is different on a warrant issued from the Circuit Court on indictment. Here the warrant carries with it a mittimus. It says commit to jail if it is a felony; if it is a misdemeanor it says unless he makes bond, commit to jail. See Section 3279, 3280, Code of Alabama, 1923.

Now the rule is, if the Justice of the Peace tries the defendant for an offense of which he does not have final jurisdiction, then he does not sit as a Justice of the Peace, but as a Committing Magistrate and all he can do is to bind the defendant over to the Grand Jury. If the evidence shows probable cause in this instance, he must give the sheriff or constable an order committing him to jail, that is, if the case is not bailable. But, if it is bailable, the order or mittimus should recite he is committed to jail, unless he makes bond in the sum set by the Magistrate. Quarterly Report of the Attorney General, Volume II, page 133, Question 23; Biennial Report of the Attorney General, 1932, page 514.

As to your third request, if the sheriff fails to have such mittimus on file as required by Section 4804, Code of Alabama, 1923, I would not say that this is such a derelict of duty as would bar the sheriff from collecting

the feed bill. If the sheriff has actually had the prisoner and has actually fed and cared for him, I believe that justice and equity demands that he be paid and if he has been paid, that he should not be required to refund the money collected. Of course, his jail book should show when he was received in jail and when he was discharged from jail, but to make an iron clad rule that he must be able to produce the mittimus, I think would in many instances work an unjust hardship.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 22, 1937

Hon. O. L. Andrews, Clerk,
Circuit Court of Jefferson County.
Birmingham, Alabama.

1. Costs and fees—joint trial—In a case in which sixteen defendants have been jointly tried, only one solicitor and court reporter's fee should be charged.

(1) Said fees should be prorated among cost bills of defendants.

2. Officer's fees in Jefferson County should be paid into the County Treasury since all officers are paid salaries.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"Recently in this Court sixteen defendants charged with felonies were tried jointly by agreement on separate indictments and in cases which were docketed separately. Will you kindly give me your opinion on the following questions:

"1. The defendants not having been jointly indicted, should the Clerk charge a Solicitor and Court Reporter's Fee in each of the sixteen cases or should only Solicitor and Court Reporter's Fee be charged?

"2. If only one Solicitor and Court Reporter's Fee should be charged, how is the Clerk to determine which case it should be charged in?

"3. The Clerk of the Circuit Court collects fees belonging to various officers, such as Sheriffs, Constables, and Witness fees, in cases that are appealed from or bound over to the Grand Jury from Inferior Courts. Should the Clerk remit all these fees to the Inferior Court or Committing Magistrate as they are charged in his transcript or should be separate fees belonging to other than said Inferior Court and pay direct to officers to whom they belong? For example, the Sheriff of Jefferson County makes practically all arrests on warrants, and serves all subpoenas issued from the Jefferson County Court of Misdemeanors and Felonies. Where the case is appealed to the Circuit Court or bound over to the Grand Jury from said Court, the Clerk of the said Court

prepares a transcript which includes a cost bill with the Sheriff and other fees included; should the Clerk of the Circuit Court remit these fees when collected to the Clerk of the said Inferior Court for him to pay to proper officers or should the Clerk or the Circuit Court pay them to the officers to whom they belong?

"4. Can a defendant convicted in a Bastardy proceeding be sentenced to hard labor for the County on failure to pay the cost in the case?

"5. Section 3667 of the Code of 1923 sets out the items of cost to be paid by the Convict Department where a defendant is convicted and sentenced to the penitentiary. It provides for the fees of Committing Magistrate and Constable on preliminary trial both not to exceed five dollars.

"Section 3755 provides that the Committing Magistrate and Constable on preliminary trial are entitled to fees both not exceeding ten dollars and that the witnesses for the State before the Committing Magistrate are entitled to witness fees not exceeding ten dollars.

"Where a defendant is sentenced to the penitentiary and the fees of the Committing Magistrate, and Constable exceed \$5.00, the amount to be paid by the State, under Section 3667, should the Clerk issue an execution against the defendant for the difference and also for the witness fees accruing before the Magistrate?

"6. Where a defendant is convicted and sentenced to the penitentiary, should the Clerk issue an execution against the defendant for the difference between the cost that actually accrues in the case and the amount paid by the Convict Department?

"7. If your answer to the sixth question is in the affirmative, should the execution include Removal Bill, and value of property where not restored to the owner, in cases where these items appear?"

In reply to your first question I wish to advise that in my opinion, the cost bills here considered should include only one solicitor's fee and one stenographer's fee. The solicitor's fee is earned upon the conviction of the defendant. A conviction may be of one or many defendants. The number of persons convicted does not give plurality to the conviction when all the defendants are convicted in joint trial, as all defendants are included in the one conviction. I refer you to the case of *Brown et al v. State*, 46 Ala. 148 and to the authorities cited therein. See, also, Biennial Report of the Opinions of the Attorney General, 1930-1932, p. 532 and authorities cited therein.

These fees should be prorated among all the defendants. See Biennial Report of the Attorney General, 1926-1928, p. 250. See, also, *Brown et al v. State*, supra. I wish to refer you, also, to an opinion addressed to Hon. Chas. W. Lee, State Comptroller, under date of November 29, 1935, Reported in Quarterly Report of Attorney General Vol. I, page 250.

Your second question is answered in the reply to your first question.

In reply to your third question, I wish to advise that it is my understanding that all officers in Jefferson County are paid salaries in lieu of fees and other compensation as provided for by Constitutional Amendment and various Acts of the Legislature governing the officers concerned. It therefore becomes incumbent upon the clerk to pay the officers' fees into the County Treasury.

In reply to your question numbered four, I refer you to Section 3428 of the Code of Alabama of 1923 and the authorities cited thereunder, which provides as follows:

"Judgment on failure to give bond.—On failure to give such bond, the court must render judgment against the defendant for such sum as, at legal interest, will produce the amount directed to be paid yearly; and he must also be sentenced to hard labor for the county for one year, unless in the meantime he executes the bond required, or pays the judgment and costs. If the defendant is sentenced to hard labor, the proceeds of his hire or labor shall be paid to the judge of probate for the support and education of the child, as is provided in Section 3427 (6376) of this Code."

I also wish to refer you to an opinion of the Attorney General rendered to Hon. B. Cooper, County Treasurer, under date of April 28, 1931 reported in Office Edition, Book 3, p. 312 and to an opinion of the Attorney General rendered to Hon. F. W. McLane, Circuit Clerk of Talladega County, under date of January 15, 1932, reported in Office Edition, Book 3, p. 165.

In reply to your fifth and sixth questions, I wish to refer you to an opinion of the Attorney General addressed to Hon. Charles W. Lee, State Comptroller, under date of February 7, 1936 reported in the Quarterly Report of Opinions of the Attorney General, Vol 2, p. 118.

In reply to your seventh question that concerns the value of property where not restored to the owner, I wish to refer you to an opinion of the Attorney General addressed to Hon. O. L. Andrews, Clerk of Circuit Court of Jefferson County, under date of June 26, 1936, a copy of which I enclose. As it concerns removal bills, I wish to refer you to Section 3741 of the Code of Alabama of 1923. I wish to further refer you to the following opinions of the Attorney General:

Biennial Report—1930-1932, p. 980.

Biennial Report—1928-1930, p. 565.

Biennial Report—1928-1930, p. 592.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 22, 1937

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County,
Bessemer, Alabama.

Taxation—Assessment by owner of Sales Certificate issued to the State.

1. Owner of Sales Certificate purchased from State may assess the property before the end of the current tax year without penalty.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your recent inquiry which I quote as follows:

"When a sales certificate has been assigned and the person receiving assignment assesses the property, am I supposed to charge him a fifty-cent delinquent fee and ten per cent penalty?

"For example, a piece of property sold to the State for 1935 taxes and a person purchased the sales certificate, paying the 1935 and 1936 taxes after the penalty for late assessment had accrued. Should he be penalized on 1937 tax assessment?"

It is my opinion that the assignee or owner of the sales certificate of land sold the State of Alabama for payment of taxes is lawfully entitled to assess the land for taxation during the current tax year without penalty.

Many of the reasons set forth in an opinion of this office to Mr. John I. Smith, Tax Collector, Etowah County, Gadsden, Alabama, dated August 15, 1936, appearing in the Quarterly Report of the Attorney General, Vol. 4, page 139, have forceful application to, and support the conclusion herein. The applicable reasons set forth in this cited opinion are adopted and made a part of this opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 22, 1937

Hon. L. C. Garrison,
Judge of Probate,
Walker County,
Jasper, Alabama.

Section 348, Schedule 94 (b) Revenue Act of 1935—Privilege tax payable on recording of contract renewing or extending mortgage.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 19, 1937, in which you request my opinion as follows:

"There has just been offered for record in this office "memorandum of agreement" dated April 1, 1930, between Alabama Fuel and Iron Company and Empire Land Company. There is some doubt as to whether this paper would bear a filing tax. I am giving the agreement hereinbelow, except the acknowledgments, and will thank you to render an opinion as soon as possible.

"Memorandum of Agreement" dated April 1, 1930, between Alabama Fuel and Iron Company, hereinafter called the "Alabama Company," and Empire Lend Company, hereinafter called the "Empire Company," both parties being corporations.

"1. On October 1, 1925, the Alabama Company was indebted to the Empire Company in the sum of \$1,250,000 which was represented

by the Alabama Company's ten notes for \$125,000 each maturing on October 1st of each year from 1926 to 1935, both years inclusive, which bore interest at 5 per cent per annum, payable semi-annually on the first of each April and October. The payment of this indebtedness was secured by a mortgage dated October 1, 1925, in which the Alabama Company conveyed to the Empire Land Company certain lands and rights in Walker County, Alabama, said mortgage being recorded in the office of the Judge of Probate in Walker County, Alabama, in Book 277, page 68.

"2. The Alabama Company has paid a total of \$375,000 of the principal hereinbefore described and has paid all of the interest due up to April 1, 1930, and the parties hereto desire to readjust the payments of the unpaid balance of \$875,000.

"3. The Alabama Company will execute and deliver to the Empire Company its fourteen (14) promissory notes for \$62,500 each dated April 1, 1930, and maturing respectively on the first day of each October in the years 1931 to 1944, both years inclusive, and bearing interest at 5 per cent per annum until maturity payable semi-annually on the first of each April and October. The payment of said notes shall be secured by the mortgage of October 1, 1925, hereinbefore referred to, and said mortgage shall remain in full force and effect until the principal and interest of said notes is fully paid in accordance with the terms of said notes and the terms of said mortgage and until all of the covenants and agreements in said mortgage contained are fully kept and performed.

"4. Upon the execution and delivery of the fourteen notes hereinbefore referred to the Empire Company will deliver to the Alabama Company the latter's seven (7) unpaid notes for \$125,000 each dated October 1, 1925.

"In Witness Whereof the parties hereto have caused these presents to be executed for them in duplicate by their duly authorized Officers."

It would appear from your statement that the privilege or license tax must be paid upon the instrument. Section 348, Schedule 94 of the Revenue Act of 1935 provides (Acts 1935, p. 477):

"No mortgage, deed of trust, contract of conditional sale or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this State, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record to-wit: (a) upon all such instruments which are executed to secure any indebtedness which shall not exceed \$100.00, there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure the indebtedness of more than \$100, there shall be paid the sum of fifteen cents for each one-hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage, deed of trust, contract, conditional sale, or other instrument of like character."

It is specifically provided by subdivision (f) of Schedule 94 (Acts 1935, p. 480):

"(f) When the time for the payment of the indebtedness secured by any such mortgage, deed of trust, contract of conditional sale, or other instrument in the nature of a mortgage, is extended or renewed

and the extension or renewal contract is offered for record, the tax required in this section shall be paid on the amount of indebtedness so extended or renewal; and the same shall be governed in all respects by the provisions of this subdivision. There shall be no ad valorem tax paid on any such instrument, or the debt secured thereby which shall have paid the tax prescribed by this section, either State, County or Municipal."

Since it appears from your letter that the contract or agreement in question renews or extends an unpaid balance of \$875,000, you should collect the mortgage privilege tax at the rate of fifteen cents for each \$100 of that unpaid balance.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 22, 1937.

Hon. Henry S. Long,
Chairman, State Tax Commission,
C A P I T O L .

License Inspector—Not entitled to citation fee in citing operators of motor vehicles who have failed or refused to make application for replacement of lost tags.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 5, 1937, enclosing letter of Hon. J. A. Carnley, Judge of Probate, Coffee County, requesting my opinion as follows:

"We are in receipt of the following letter from the Judge of Probate of Coffee County, Alabama.

" 'Is there a provision in the revenue Code for a fee to be collected for the license inspector in cases where automobile owners are cited to apply for replacement tags?

" 'We have a number of people who have lost their front tags and the license inspector has cited them to apply for replacements. I would like to know if we are required to charge them a fee, or rather are we responsible to the License Inspector for a fee when we fix up the application and send it in for replacement tags? Will appreciate your early reply.'

"As the Tax Schedule Code is not clear, will you be kind enough to give this your attention and an early ruling as to whether a license inspector would be entitled to a citation fee in citing operators of motor vehicles who have failed or refused to make application for replacement."

Section 353 (a) provides:

"If the license Inspector shall discover any motor vehicle being operated without a **proper or legal license**, he shall cite the operator of the motor vehicle, and in filing copy of such citation with the Probate

Judge he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof."

Thus we note that a vehicle being operated without a front tag, while in fact being operated in violation of the provisions of the law above quoted, is not necessarily "being operated without a proper or legal license" within the meaning of Section 353 (a), quoted supra. For where the proper tags have been procured and one or both are lost it cannot be said that the owner of the motor vehicle in question has not a "proper or legal license." It is true that he does not have the **evidence** of such license, i. e., the license plate or tag, but under the facts detailed in your inquiry he has in fact the proper license in that he has paid for his original tags.

Moreover, the replacement tags in question must be procured, not from the Judge of Probate, but from the State Tax Commission as provided by Schedule 158.16. This is another fact which leads to the conclusion that the license inspector is not entitled to the citation fee of \$1.50 for citing operators of motor vehicles who have failed or refused to make application for replacement.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 24, 1937.

Hon. Houston Cole,
Superintendent of Education,
Tuscaloosa County,
Tuscaloosa, Alabama.

Schools—Free Text Books—

Cost of reconditioning and repairing free text books may be paid by County Board of Education (School Code of 1927, Section 452).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I should like to know if it is legal for this office to pay for repairs on the free text books furnished the schools of Tuscaloosa County. You understand that these books are furnished out of the schools funds of the State of Alabama."

Your inquiry must be answered in the affirmative.

The statute authorizing State appropriations for the procurement of free text books makes no express provisions for reconditioning or repairing of such text books after the same have been procured and issued for use.

However, Section 452 of the Alabama School of 1927 provides:

"452. COUNTY AND CITY MAY ASSIST IN PURCHASING BOOKS.
—County Board of Education, City Boards of Education, the Courts of County Commissioners, and other like governing bodies of the Counties

or municipalities, shall have power and authority to appropriate funds for the purpose of purchasing textbooks for free distribution or for rental to the patrons of its public schools under such rules and regulations as shall be prescribed by the respective County Boards of Education or City Boards of Education."

In my opinion, this provision, by necessary implication, affords authority to pay the necessary costs of reconditioning and repairing such free text books.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 29, 1937.

Hon. William O. Baldwin,
Chairman, Alabama Alcoholic
Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act.—

Cards containing names and addresses of Distributors or Manufacturer and of representatives and, in addition, statements calculated to emphasize desirable qualities of named brands of liquor and brand code numbers and prices of such liquors, constitute illegal advertising of such liquors.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"We forward herewith business card of a representative of one of the distilleries doing business in Alabama through the Alabama Alcoholic Beverage Control Board.

"Question 1: Is it within the advertising provisions of the Alabama Beverage Control Act for a representative of a distillery, doing business in Alabama, to use on his business cards descriptive literature of the alcoholic beverages for sale at the State stores, together with code numbers and prices as set by the Alabama Alcoholic Beverage Control Board?

"Question 2: Is it within the advertising provisions of the Alabama Beverage Control Act for a representative of a distillery, doing business in Alabama, to use on his business cards descriptive literature of alcoholic beverages not listed for sale in the Alabama State stores, but for which said distillers wish to build up a demand within the State?"

The card attached to your inquiry is about five inches by six inches and has printed matter on both sides. It is designed to be folded in the middle and when so folded it is about the size of a large business card. For the purpose of incorporating the card in this request, I have omitted the names of the distiller and the representative, and the names and code number of the several brands of whiskey appearing thereon.

On the front of the folded card is printed:

“_____ Distillery Co.
Famous Kentucky Whiskies since 1870
at Louisville in Kentucky

“(Name of Agent).
Greystone Hotel,
Montgomery, Alabama.”

On the back of the folded card are printed code numbers, brands and prices in form as follows:

“ORDER BY CODE NUMBER

Code No.	Name of Brand	
A _____	quarts (Name of brand) _____	4.75
B _____	quarts (Name of brand) _____	2.45
A _____	quarts (Name of brand) _____	1.60
B _____	pints (Name of brand) _____	.85
A _____	quarts (Name of brand) _____	1.70
B _____	pints (Name of brand) _____	.90
A _____	quarts (Name of brand) _____	1.35
B _____	pints (Name of brand) _____	.70”

On the inside of the folded card is printed:

“(Name of Brand):

“Is the most outstanding four years old bonded whiskey on the market today. Traditionally our leading brand for three generations.”

“(Name of brand):

“90 Proof. A deliciously smooth, straight Kentucky Whiskey.”

“(Name of brand):

“A 100 Proof rich bodies straight whiskey distilled from carefully selected fine grains.”

“(Name of brand):

“A 90 Proof straight Kentucky whiskey with an aromatic fragrance and a truly royal flavor.”

“(Name of distiller) straight whiskies are made of 35 per cent small grains and receive the same careful attention in their distillation and ageing as our (Name of brand), the principal difference between them being in their proof and the age at which they are withdrawn from deep charred white oak barrels.”

In my opinion, both of your inquires must be answered in the affirmative, that is to say, the circulation of such cards is a violation of law. Section 10 of the Alabama Beverage Control Act provides in part as follows.

“There shall be no advertising of alcoholic beverages as enumerated and defined herein, except through newspapers, magazines and radio broadcasting stations, provided, however, that malt or vinous beverages as herein provided may be advertised by means of billboards.”

To “advertise” is “to call to public attention, especially by emphasizing desirable qualities in order to arouse a desire to purchase * * * patronize or the like.” Webster’s New International Dictionary.

The card in question comes within this definition.

It must not be understood from this conclusion that all business cards of liquor dealers or representatives are banned by the quoted provision of the law. Such a card which merely reflects the name and address of the distiller or distributor and the representative, and like information, does not constitute advertising within the meaning of the Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 29, 1937.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Attention of Mr. Wampold.

Alabama Beverage Control Act—Wholesalers, distributors and/or jobbers of malt or brewed beverages doing a transient dealer's business are liable for license imposed by Schedule 147 of Section 348 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 8, 1937, which is as follows:

"The License Inspector has cited the Beer Dealers under Schedule 147 for Transient Dealers License; \$30.00 to the State and \$5.00 to the County. These dealers have protested and state that they do not come under this Schedule for two reasons; First, Beer was illegal at the time this Schedule was passed and Second, that they would be exempt the same as Soft Drinks.

"So that you will clearly understand, these dealers are wholesale distributors of Beer; they load a truck at their place of business in the morning and then they call on the dealers, sell and deliver beer by the case and pick up empty cases.

"The matter of license is pending an opinion from this office, and I will thank you to give me this as soon as possible."

In answer to your inquiry, I am of the opinion that wholesalers, distributors and/or jobbers of malt or brewed beverages, who do business as transient dealers, are liable for the license under Schedule 147 of Section 348 of the Revenue Act of 1935.

Schedule 147, *supra*, imposes a license on transient dealers as therein defined. The liability under this schedule is dependent on the manner in which such business is conducted.—**Quarterly Report of Attorney General, Vol. 2, pp. 310.** When a wholesale merchant allows his salesmen to sell goods and make deliveries from his trucks, then he is not conducting a regular wholesale business, but come within the classification of a transient dealer. **Quarterly Report of Attorney General, Vol. 2, p. 164.**

Assuming that the method of doing business by the wholesalers, distributors and/or jobbers of malt or brewed beverages in question comes within the definition of transient dealers as defined in Schedule 147, supra, the question then presents itself as to whether or not such dealers are otherwise exempt from the payment of said license.

I find nothing in Schedule 147, supra, itself that would exempt them from the payment of said license. They do not come within the exemption under Schedule 33 and Schedule 159.16 of Section 348 of the Revenue Act of 1935. Neither do they come within the exemption under Section (k), subsection 2 of Section 147, as they are not dealers of bottled soft drinks in a county where such bottling plant is located. In my judgement, malt or brewed beverages can, in no sense of the word, be considered as soft drinks as suggested in your inquiry.

The fact that the sale of malt or brewed beverages, as defined in Alabama Beverage Control Act, was illegal at the time of the enactment of the license schedule in question, in my judgement, is immaterial. The schedule imposes a license on transient dealers regardless of the nature of the products sold or offered for sale (With certain exceptions specifically enumerated). The license is on the method of doing business and not on the kind or nature of the commodity or products sold or offered for sale.

It may be argued that the licenses and taxes imposed by the Alabama Beverage Control Act are exclusive and that no other form of taxation is, or should be, imposed on those who have paid the licenses and taxes required by said Act. However, this argument is negated by the express provision of Section 27 of the Alabama Beverage Control Act, which provides as follows:

"Section 27. That in addition to all other taxes now imposed by law and in addition to licenses provided for in this Act, there is hereby levied a license or privilege tax on every person licensed under this Act who sells and/or stores and/or receives for the purpose of distribution to any person, firm, corporation, club or association within the State of Alabama malt or brewed beverages as hereinabove enumerated and defined, either or all, a tax shall be measured by and graduated in accordance with the volume of sales of such persons, said tax to be collected by the Alabama Alcoholic Beverage Control Board in the following amounts and in the manner hereinafter set forth."

It will be noted from the above language, that the specific tax therein levied shall be in addition to all the taxes now imposed by law, and in addition to the license provided for in said Act. This shows, in my judgement, a legislative recognition that the wholesalers, distributors and/or jobbers of malt or brewed beverages are subject to other taxes than those specifically provided for in said Act. Such recognition is tantamount to the legislative intent that such dealers shall be subject to other taxes or license fees already imposed by law if same otherwise properly attach.

The premises considered, it follows that the dealers in question, doing a transient dealers business within the definition set out in Schedule 147, supra, are subject to the license fees imposed thereunder.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1937.

Hon. J. A. Keller,
Superintendent of Education,
Montgomery, Alabama.

Colleges—Under facts stated State Teachers College may purchase alcohol for use in their non-commercial laboratories, without obtaining a permit from the Alcoholic Beverage Control Board.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of May 4, 1937, in which you state:

"I am enclosing letter from H. L. Van Dykes, Head of the Department of Science, State Teachers College, Montgomery, seeking advice concerning the purchase of alcohol for use in the laboratories of that institution, which is under the control of the State Board of Education."

You request my opinion as follows:

"1. Can the institution proceed as heretofore to purchase alcohol from chemical companies for use in the laboratories?

"2. If such procedure is permissible under the prohibition law, will it be necessary under the provisions of Section 58 of the Alabama Beverage Control Act to secure a permit from that board where the institution is located in a county subject to the provisions of that act?"

Answering your question, it is my opinion that the State Teachers College may purchase alcohol from chemical companies for use in their non-commercial laboratories without obtaining a permit from the Alabama Beverage Control Board. Such purchases are expressly exempted from the provisions of the Alabama Beverage Control Act by Section 58 of the Act, which provides as follows:

"Section 58. Regularly licensed physicians, dentists, and/or any person holding a license to practice medicine, or to engage in any profession wherein the treatment of the human body and/or of a animal body is necessarily involved, clinics, **non-commercial laboratories, hospitals,** and/or sanatoria may acquire, own and dispense for medical, mechanical or scientific purposes only, and not for beverage purposes, any alcoholic beverage, and/or ethyl alcohol; also any minister, pastor or officer of a regularly organized religious congregation or church, and any other person who, under the ritual of any recognized religious denomination, is authorized or required to use wine for sacramental or religious purposes in the ceremonies or ritual of such religious denominations."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1937

Hon. E. L. Hurst,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Alabama Beverage Control Act—Hotel, club or restaurant within police jurisdiction of city liable for not exceeding one-half city license; city may collect beer license from persons doing business within police jurisdiction of city; city has no authority to refuse to issue license where state and county license has already been issued.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please advise me whether under Section 11 (a) of the Alabama Beverage Control Act a hotel, restaurant or club located without the city limits but within the police jurisdiction thereof, is liable for both County License and city license.

"Please inform me, also whether a city may collect beer licenses from persons, etc. doing business wholly without the corporate limits of the city, but within the police jurisdiction thereof; also whether the city has the authority to refuse to issue license where the state and county license have already been issued."

In my opinion your first inquiry should be answered in the affirmative. There are no provisions in the Alabama Beverage Control Act with respect to licenses by municipalities, and the general law as to such licenses prevails. Act No. 580 of General Acts, 1927, at page 674, reads in part as follows:

"That any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town and without the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like businesses, trade or profession done within the corporate limits of such city, fees and penalties excluded."

Under the authority of this Act, a municipality may fix and collect licenses for hotels, clubs or restaurants doing business within the police jurisdiction thereof, subject, however, to the limitation as set out in the opinion of this office to you under date of April 20, 1937—that is, the city must be located within a wet county.

The same opinion is reached as to the authority of the city to collect beer licenses from persons doing business wholly without the corporate limits of the city but within the police jurisdiction thereof.

Your third inquiry is whether the city has the authority to refuse to issue license where the State and County license have been issued. If you intend this inquiry to apply to hotels, clubs and restaurants, I refer you to Section 11 (b) of the Beverage Control Act, which requires applicants for such State licenses to secure the approval of the governing board of the city within which they propose to do business.

Insofar as this inquiry is addressed to the right of the city to refuse to issue licenses to beer dealers already licensed by the State and County, it is my opinion that such city has no authority to refuse to issue license to one already licensed as required by the Alabama Beverage Control Act. Section 89 of the Constitution reads: "The legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of the State." In *Mitchell v. City of Birmingham*, 222 Ala. 389, 133 So. 13, the Supreme Court said:

"If the state law clearly establishes a public policy as to the personal rights of a citizen, or clearly extends the privilege of doing a specified business to all places in the state upon payment of a license, then no general grant of charter power will warrant a municipal corporation prohibiting such business. A licensed business is a lawful business. One act cannot be both lawful and unlawful under the positive laws of the same sovereignty."

In my opinion, therefore, the city has the authority to levy a reasonable license for selling beer within the police jurisdiction of the city, but has no authority to prohibit the selling of beer by one legally licensed to do so by the State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1937.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Alabama Beverage Control Act—

Liquor purchased legally in another state cannot be legally possessed in the State of Alabama.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 21, 1937, which follows:

"I will appreciate your opinion as to whether liquor purchased legally in another state may be legally possessed in dry territory in this state."

In my opinion, liquor purchased legally in another state cannot be legally possessed in the State of Alabama, either in wet or dry territory.

I call your attention to the following provisions of the Alabama Beverage Control Act:

Section 19, sub-section (3):

"Only malt or brewed beverages as herein defined can be sold and/or distributed under license issued to any wholesaler, distributor and/or retailer of such beverages as enumerated and defined and licensed as such

under this Act. All vinous beverages, whether or not manufactured within or without this State, can be sold by the manufacturers only to State Liquor Stores as herein defined. All other alcoholic beverages will be manufactured, **imported**, sold and/or distributed by the Board through the State Liquor Stores in the manner prescribed in this Act."

and to the following part of Section 51:

"In all Counties of the State it shall be unlawful for any person, firm or corporation to have in his or its possession any still or apparatus to be used for the manufacture of any alcoholic beverage of any kind, or any alcoholic beverage of any kind illegally manufactured, or transported, within the State, **or imported into the State from any other place without authority of the Alcoholic Control Board of the State**, and any person, firm or corporation violating this provision or who transports any illegally manufactured alcoholic beverages, upon conviction shall be punished as now provided by law." (Emphasis ours).

In view of the very clear and unambiguous provisions of the above quoted parts of the Alabama Beverage Control Act, it is very clear to me that any liquor purchased legally in another state cannot be legally possessed in this State, whether in wet or dry territory.

Of course, this rule applies only to liquor purchased in another state by private individuals and brought from that state into the State of Alabama and does not apply to liquor purchased by and brought into this state from another state by authority of the Alcoholic Beverage Control Board of this State.

No constitutional questions are suggested by your request and none have been considered in this opinion. We have merely construed the pertinent provisions of the Alabama Beverage Control Act.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

May 29, 1937.

Hon. Wm. C. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act.

Restaurant Liquor Licenses—Expenditures for malt or brewed beverages for resale not to be considered as a part of Licensee's expenditures for either "alcoholic beverages" or "food supplies" in determining the percentage of the former as compared to the latter under Section 2 (o).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Please refer to Alabama Beverage Control Act, Section 2, subparagraph (h) and (o).

"Inasmuch as the proprietor or operator of a restaurant is required to keep an accurate account of all purchases made of food supplies and alcoholic beverages of all kinds, and inasmuch as the cost of alcoholic beverages purchased by the owner, operator, or proprietor of the restaurant shall not exceed 50% of the amount expended for food supplies, the Alabama Alcoholic Beverage Control Board desires your opinion of the following question:

"Are 'malt or brewed beverages' to be construed as 'alcoholic beverages' in carrying out the provisions of the Alabama Beverage Control Act?

"If your reply is in the affirmative, restaurant liquor licensees will be substantially restricted in the purchase of so-called 'hard' liquor; if your reply is in the negative, the cost of malt or brewed beverages would be as expended for food supplies, and would thus substantially increase the amount which might be expended for the so-called 'hard' liquors."

Because of the many conflicting and confusing provisions of the Alabama Beverage Control Act the Legislative intention relative to the matters submitted in your inquiry is difficult of determination. However, as I construe that part of Section 2 (o) involved in your inquiry, it was the Legislative intention that malt or brewed beverages should not be taken into consideration in determining the percentage of expenditures for alcoholic beverages purchased for resale by a restaurant liquor licensee, as compared to his expenditures for food supplies.

Section 2 (o) of the Alabama Beverage Control Act provides as follows:

" 'Restaurant' shall mean a reputable place within a municipality of four thousand five hundred population or more, or within the police jurisdiction thereof, operated by a responsible person of good reputation, and habitually and principally used for the purpose of providing food for the public; the place to have an area within a building of not less than one thousand (1,000) square feet on one floor in one room equipped with tables and chairs, accomodating at least fifty (50) persons at one time, and a kitchen apart from such area of one thousand (1,000) square feet but adjoining same, regularly used for the preparation of food for the public, and in which kitchen the food or meals served in such places are prepared. The proprietor or operator of a restaurant as herein defined shall be required to keep an accurate account of all purchases made of food supplies and alcoholic beverages, of all kinds and the cost of alcoholic beverages purchased by the owner, operator or proprietor of such restaurant shall not exceed fifty (50) per cent of the amount expended for food supplies. Provided, however, no permits shall be issued to tourist camps, road houses or night clubs."

The Legislature, in limiting expenditures made for alcoholic beverages to a percentage of the food supplies purchased, used the terms "alcoholic beverages of all kinds" and "alcoholic beverages."

This would seem to indicate the Legislative intention that in determining the amount of purchases of "alcoholic beverages" made by a restaurant liquor licensee his expenditures for malt or brewed beverages for resale should be included. However, because of the fact that statutes often are drawn artificially and inaptly, the Courts have adopted well defined rules of construction to aid in arriving at the Legislative intention. In *City of Birmingham v. Southern Express Company*, 164 Ala. 529, 537, the Court said:

"That construction of statutes is correct that gives to each the effect which the statute maker intended. The intent of the lawmaker is the law. Courts are to construe and interpret the meaning of statutes, and then declare the intent of the lawmaker, which is the law. If the meaning of the words or language used by the lawmakers is clear and certain, then there is no room or occasion for construction or interpretation. It is only when the meaning of the language and intent of the lawmaker is not obvious or certain that courts are needed or required to interpret. Where the meaning of the language used, or the intent of the lawmaker, rests in inference, then construction and interpretation are useful. If the meaning or the intent is obvious and clearly expressed, then it does not rest in inference. The clearly expressed meaning or intent must and should prevail, though others could be assigned. If one meaning be certainly expressed, and another left to inference, the one expressed should prevail.

"This rule of construction does not imply that the letter shall control the spirit. A thing may be within the letter of a statute and not within the meaning or spirit, or it may be within the clear meaning or spirit and not within the letter. Courts, in construing statutes, often look less to the letter than to the context, the spirit, or to the meaning of the statutes to arrive at the true intent of the lawmaker. Statutes are often drawn inartificially. Apt words are not always used, and perspicuity and precision are not always observed by those who draft statutes."

In *Nunez et al. v. Borden*, 226 Ala. 381, the Court said:

"A statute should be given, effect according to its purpose manifested by its language and other rules of construction. The court is often not controlled by the literal language of the statute, but by its meaning when properly interpreted, though outside of such literal meaning."

In my judgement these rules of construction, when applied to the whole of the Alabama Beverage Control Act, lead to the conclusion that it was not the Legislative intention to include within the restriction of expenditures for alcoholic beverages for resale to 50 per cent of the expenditures for food supplies contained in Section 2 (c) expenditures for malt or brewed beverages.

For example, by Sub-section 2 (c) a "restaurant" such as is authorized under the Act to resell liquor purchased from an Alabama Liquor Store, must be operated within a municipality of not less than 4500 population or within the police jurisdiction thereof, and must be a place principally used for providing food for the public; and is required to have a minimum floor area and seating capacity at tables, etc.

Sections 11 (a) and 17 of the Alabama Beverage Control Act provide:

"Section 11 (a). Authority to issue liquor licenses to Hotels, Restaurants and Clubs.—Subject to the provisions of this Act, and regulations promulgated under this Act, the Board, with the approval of the City Commissioners or other governing authority, if the hotel, restaurant or club be located in a municipality, or with the approval of the Board of Revenue and Board Commissioners or other governing authority, if the hotel, restaurant or club be located in the County and outside the limits of the municipality shall have authority to issue a liquor license for any premises kept or operated by a hotel, restaurant or club and specified in the license, entitling the hotel, restaurant or club to purchase liquor from an Alabama Liquor Store and to keep on the premises such liquor and, subject to the provisions of this Act and the regulations

made thereunder to sell the same and also vinous, malt or brewed beverages to guests, patrons or members for consumption on the hotel, restaurant or club premises. Such licensees shall be permitted to sell malt or brewed beverages as defined in this Act and wines of alcoholic content not in excess of twenty-four (24%) per cent by volume, for consumption on the premises. Such licenses shall be known as hotel liquor licenses, restaurant liquor licenses, and club liquor licenses respectively."

(Italics Supplied).

"Section 17. Sale of Malt or Brewed Beverages—Every license issued to a hotel, restaurant, club or railroad, pullman or steamship company under this Act for the sale of liquor, shall authorize the licensee to sell vinous and malt or brewed beverages at the same places, but subject to the same restrictions and penalties as apply to sales of liquor, except that licensees may sell vinous malt or brewed beverages, as herein defined, for consumption on the premises where sold in the manner hereinafter set forth."

It will be noted that the principal theme of these sections is authorization for the resale by hotels, restaurants and clubs, which qualify under the Act, of liquors purchased by them for resale from the State Liquor Stores. The authorization therein contained that such liquor licensees may also sell malt and brewed beverages is merely incidental.

Section 2 (r) of the Alabama Beverage Control Act provides:

"(r) 'Retailer', means and includes persons licensed by the Board to engage in the retail sale of malt or brewed beverages of an alcoholic content not in excess of four (4%) per cent by weight and five (5%) per cent by volume to be consumed on the premises or to be carried or delivered to the address of purchaser."

Section 21 (a), (b) and (1), (2), (3), (4), (5), (6), (7), (8) and (c), (1) provides in part as follows:

"Section 21 (a) Filing of Application for Distributors', Wholesalers', and Retailers Licenses—Every person intending to apply for a distributor's, wholesaler's, or retailer's license as aforesaid in any municipality or county in this State, shall file with the Board his or its application. * * * The applicant shall at the time of filing the application pay said Board the filing fee of Ten (\$10.00) dollars as specified in this Act.

"(b) Application for Distributors', Wholesalers' and Retailers' Licenses—Application for Distributors', Wholesalers' and Retailers' licenses shall contain the following information and statements:

(1) The name and residence of the applicant, and how long he has resided there; if an association, partnership, or corporation, the residences of the members, officers and directors;

(2) The particular place for which the license is desired, and a detailed description thereof;

(3) Place of birth of applicant, and if a naturalized citizen, where and when naturalized; and if a corporation organized or registered under the laws of the State, when and where incorporated with the names and addresses of each officer and director; * * *

(4) Name of owner of premises and his residence;

(5) That the applicant is not, or in case of a partnership or association that the members or partners are not, and in the case of a corporation that the officers and directors are not, in any manner pecuniarily interested either directly or indirectly in the profits of any other class of business regulated under this Act, except as hereinafter permitted;

(6) That applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed, and that no other person shall be in any manner pecuniarily interested therein during the continuance of the license, except as hereinafter permitted.

(7) Whether applicant, or in case of a partnership or association any member or partner thereof, or in case of a corporation any officer or director thereof, has, during the three years immediately preceding the date of said application, had a license for the sale of malt or brewed beverages or spiritous and vinous liquors revoked;

(8) A full description of the portion of the premises for which license is asked and if any other business is to be conducted concurrently with the sale and distribution of vinous and malt or brewed beverages, a full history of such business relating the nature thereof, the length of time it has so previously been conducted by the applicant or his predecessor, at such location;

(c) Prohibition Against the Grant of Licenses—

(1) Any retail dispenser may be granted licenses to maintain, operate or conduct any number of places for the sale of malt or brewed beverages, but a separate license must be secured for each place where malt or brewed beverages are sold, provided, there shall be no license issued by the Board for the sale of Alcoholic beverages, by Rolling stores. Any retail dispenser may be granted license to maintain operate or conduct any number of places for the sale of malt or brewed beverages; but the fees for such license shall be graduated upon a basis of 33 1/3 of each license above the cost of the last preceding license."

These provisions relate to retail dealers in malt and brewed beverages who do not operate establishments which come within the definition "restaurant" herein above referred to, so as to qualify as Restaurant Liquor Licensees.

There is no limitation as to amount of sales of malt or brewed beverages by any such retailer. Consider, for example, the case of the operator of a small restaurant which, because of limitation as to floor space or seating capacity, is unable to meet the requirements of the statute as a "restaurant liquor licensee," but who nevertheless is duly licensed to sell malt and brewed beverages at retail. There is no sort of limitation upon the amount of such malt and brewed beverages that he may sell at retail; and yet, if he increases the size of his establishment, so that he may be issued a restaurant liquor license, under any other interpretation of the Act than the conclusion here arrived at, his expenditures for malt and brewed beverages would be taken into consideration in arriving at the percentage that his alcoholic beverage purchases bore to his purchase for food.

And such a small restaurant operator, who could not qualify as a restaurant liquor licensee, would be allowed to sell malt and brewed beverages without limit, whereas his competitor next door who did qualify as a restaur-

rant liquor licensee would have a limitation upon the amount of sales of such malt or brewed beverages, depending upon his expenditures for food supplies.

Or consider, for example, the operator of a restaurant which has all the qualifications for a restaurant liquor license required by Section 2(o) except that it is operated in a city or town of less than 4500 population. He cannot be licensed to sell liquor at retail, but he can qualify and obtain license to sell malt and brewed beverages at retail. His expenditures for malt and brewed beverages for resale may be double or ten times his expenditures for food supplies, without running afoul of any provision of the Act. Can it logically be found that the legislature intended such a restaurant operator to have the right to sell malt and brewed beverages in unlimited quantities, and yet to conclude that it intended that the operator of a restaurant identical in size and type of patronage in an adjoining town of 4500 population who is qualified as a liquor licensee, should be required to take into consideration his sales of such malt and brewed beverages in determining the percentage of his expenditures for alcoholic beverages as compared to his expenditures for food supplies?

The very patent purpose of the legislature in requiring that the liquor purchases of a restaurant liquor licensee should be only one-half of the amount he expends for food supplies was to provide against the operator of any such establishment maintaining what on its face was a restaurant but was, in fact, an old time saloon.

Inasmuch as the legislature has seen fit to permit the unrestricted sales of malt and brewed beverages by restaurants which cannot qualify as restaurant liquor licensees, it seems unthinkable that it was the legislative intention to make the expenditures of restaurant liquor licensees for such malt and brewed beverages a part of the formula for determining whether such establishments were in fact restaurants or were saloons, clothed in the panoply of a restaurant.

In the last clause of your request for opinion, you assume that, if expenditures of a restaurant liquor licensee for malt and brewed beverages are not to be considered in arriving at the percentage of his expenditures for "alcoholic beverages" as compared to expenditures for food supplies, such purchases of malt and brewed beverages would go to swell the total amount of purchases of food supplies, thus substantially increasing the amount which such a licensee may expend for liquor.

I cannot subscribe to the correctness of your statement. There is nothing in the letter or in the spirit of the Act which warrants any such assumption, deduction, or inference. It is wholly incorrect.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1937.

Hon. R. T. Simpson, Jr.,
Solicitor, Eleventh Circuit,
Florence, Alabama.

Alabama Beverage Control Act—Liquor or beer being sold in dry county may be confiscated under Code Section 4740 et seq; Beer or liquor legally purchased in Alabama can be legally possessed in a dry county. Giving beer to customers in dry county prohibited under Code Section 4621.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please send me a copy of your opinion of the applicability of the present liquor statute in dry counties.

"Please advise me particularly on the following:

"1. Where a person is found selling beer or liquor which has been purchased legally in Alabama can the entire lot of liquor or beer be confiscated when sold in a dry county?

"2. Can beer or liquor be legally possessed in a dry county when purchased in Alabama?

"3. A restaurant owner in town has been apprehended for giving beer to his customers (in a dry county), is this permitted under the present statute?"

In my opinion your first question should be answered in the affirmative. Section 51 of the Alabama Beverage Control Act provides:

"But in every county where a majority of the electors voting in said election vote "No", this Act shall not go into effect in such County, and all laws prohibiting the manufacture and sale of alcoholic beverages now in force and effect in Alabama shall remain in full force and effect in every such county."

This statute therefore does not operate to repeal the provisions of Chapter 167 of the Code, in dry counties, and in such counties all of the provisions of said chapter remain in full force and effect. Article 11, Chapter 167 (Sec. 4740 et seq) provides for the confiscation of contraband liquors, and this article remains in effect in dry counties.

2. I enclose a copy of my opinion to Hon. E. Dick Burrows dated April 3, 1937, which is a complete answer to your second question. For the reasons there set forth, it is my opinion that liquor legally purchased in Alabama can be legally possessed in a dry county.

3. Your third question is whether the recent statute permits a restaurant owner in a dry county giving beer to his customers. In my opinion, it does not. Code Section 4621 prohibiting the sale or giving away of prohibited liquors and beverages remains in full force and effect in such dry counties.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 29, 1937.

Hon. Festus M. Shamblin,
Sheriff, Tuscaloosa County,
Tuscaloosa, Alabama.

Alcoholic Beverage Control Act—

Keeping of legally purchased alcoholic beverages of any kind in cafe or eating establishment in dry county shall be prima facie evidence that same was kept for sale or distribution with the intent to sell or distribute contrary to law.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your request of April 10, 1937, which reads as follows:

"Please give me your opinion as to the effect of Code Section 4685 and 4686 in regards to the advisory opinion issued to Hon. E. Dick Burrows, which was issued by your office April 3, 1937.

"I am particularly interested in knowing if possession of whiskey or beer in an eating establishment or cafe would amount to prima facie evidence of a sale of whiskey or beer in a dry county.

"Should a Sheriff seize beer or whiskey in a dry county under the above circumstances, would he be liable to the owner of the beer or whiskey so seized."

Section 4685, Code of 1923, to which you refer reads as follows:

"Section 4685. Keeping of liquors prima facie evidence.—The keeping of liquors or beverages that are prohibited by the law of the State to be manufactured, sold or otherwise disposed of, in any building not used exclusively for a dwelling shall be prima facie evidence that they are kept for sale, or with intent to sell the same, contrary to law."

I am of the opinion that the keeping of legally purchased alcoholic beverages of any kind in an eating establishment or cafe would amount to prima facie evidence that same were kept for sale or distribution, or with the intent that they be sold or distributed contrary to law. The Legislature in Section 4685 has declared a rule of evidence, which it had power to do. *Fitzpatrick vs. State*, 169 Ala. 1, 53 So. 1031. I find nothing in the Alabama Beverage Control Act which repeals this provision in dry counties.

I am further of the opinion that the sheriff has authority to seize such alcoholic beverages in a dry county, under the above circumstances, and that he would not be liable to the owner of such alcoholic beverages so seized. Of course, the question of whether or not such alcoholic beverages in a dry county were possessed for the purpose of sale or distribution contrary to law is a question of fact for the court or jury, to be determined by all of the attendant circumstances.

If upon a trial of the issues the court or jury, as the case may be, should decide in favor of the defendant, such finding amounting to a legal determination by them that said alcoholic beverages were not possessed for sale or distribution contrary to law, then the possession of same would be legal and the beverages should be returned by the officers to the person or persons from whom seized.

As pointed out in an opinion to Hon. E. Dick Burrows, Sheriff of Walker County, copy of which opinion has been mailed to you, "all alcoholic beverages other than those manufactured, transported, sold and distributed in accordance with the provisions of the Alabama Beverage Control Act, are still illegal and the existing statutes in regard to the possession of the same are still in full force and effect." I refer you to this opinion for a further development of this idea.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 2, 1937.

Hon Gordon Persons,
Chairman, Rural Electrification Authority,
Montgomery, Alabama.

Electric Membership Corporations (Acts, 1935, p. 100, as amended by Acts, 1935, p. 229)—

1. Corporations operating in border counties may, if authorized by laws of Georgia, extend lines into that State for service of members residing in adjoining counties thereof.

2. Corporations not authorized to sell electric energy wholesale to like corporations in Georgia.

Opinion By Assistant Attorney General Rowe.

Dear Sir:

Receipt is acknowledged of your request for opinion as follows:

"(1) Is it possible for an electric membership corporation, created under the authority of the Acts of the 1935 regular session, as amended, to serve customers in an adjoining state, namely, Georgia. In other words, the Cherokee County Electric Membership Corporation, at Center, Alabama, has received numerous applications from residents of the adjoining counties in Georgia, and to serve them would, of course, mean that lines would have to be built into that State.

"(2) If it would be possible for this same electric membership corporation to run its lines up to the Alabama state line and sell electricity at wholesale to another electric membership corporation which might be formed in Georgia and under the laws of the State of Georgia."

Your first inquiry is answered in the affirmative. Section 9 of Acts of 1935, page 100, as amended by Acts of 1935, page 229, provides in part as follows.

"Any corporation formed hereunder, rendering service in a county in this state adjacent to a county or counties of any other state, is authorized, upon compliance with the laws of such other state, to render services in such county or counties of such other state, and persons served in such county or counties may become members."

Of course, the Electric Membership Corporation must be authorized by the laws of Georgia to engage in business in that State and all require-

ments of Georgia law must be met. In this connection, see Section 20 (a), Acts of 1935, page 229. Inasmuch as the Rural Electrification Membership Corporation Acts are more or less uniform throughout the states. It is probable that such Membership Corporations organized under the Alabama statute can qualify under Georgia law.

Your second inquiry must be answered in the negative.

Section 9 of Acts of 1935, page 100, as amended by Acts of 1935, page 229 provides in part as follows:

"The corporate purpose of each corporation formed hereunder shall be to render service to its members only, and no person shall become or remain a member unless such a person shall use energy supplied by such corporation and shall have complied with the terms and conditions in respect to membership contained in the by-laws of such corporation."

This provision, as well as the general tenor of the Act as amended, excludes the idea that the Legislature intended that corporations organized thereunder should be authorized to engage in interstate wholesale distribution of electric energy.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 2, 1937.

Hon. William A. Conrad,
Deputy Clerk, Circuit Court,
Mobile, Alabama.

Execution may be issued as often as is necessary on judgements growing out of forfeitures.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"If the Circuit Court renders a final judgement of forfeiture in a criminal case against defendant and his sureties we will say for \$500.00 and costs of forfeiture, and the Clerk of said Court performs his duty within the time required by law, that is, issues execution against defendant and his sureties for same amount and costs, and places same in the hands of sheriff and sheriff returns said execution to Court for an alias, is it the duty of the Clerk to issue an alias execution, and if it is the duty of the Clerk to issue an alias execution, is there any limited number of alias executions the Clerk is required to issue on return of sheriff for an alias."

I think you may issue as many alias executions on a judgement growing out of a forfeiture in a criminal case as is necessary to enforce the collection. It must be understood that all criminal matters when they have reached the status of a judgement, become civil proceedings in their nature

and are collected as all civil judgements. I call your attention to an opinion of this office written March 16, 1937, to Hon. Charles W. Lée, State Comptroller, Capitol, which in fact answers your request.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 2, 1937.

Hon. L. R. Stone,
County Superintendent of Education,
Bibb County,
Centreville, Alabama.

School Trustees—Upon consolidation of schools trustees should be nominated and appointed for the consolidated school.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"During 1936 trustees were elected for all schools and later on Sept. 21, we held an election to consolidate four of our schools. Do all twelve trustees have the right to serve this consolidated school until their term expires in 1938? Do the local trustees where the school is located have full authority over the school regardless of the opinions of the other nine?"

Both of your inquires must be answered in the negative.

Section 133 of the Alabama School Code of 1927, as amended by Acts of 1935, page 1092, provides:

"SCHOOL TRUSTEES: QUALIFICATIONS AND SELECTION.—The county board of education shall appoint for every school in the county from six discreet, competent and reliable persons of mature years nominated by the patrons of the said school, three persons residing near the schoolhouse, and having the respect and confidence of the community, to serve as trustees of the school, to care for the property, to look after the general interest of the school, and to make to the county board of education, through the county superintendent of education, from time to time, report of the progress and needs of the school, and of the will of the people in regard to the school; provided, that the term 'patrons' as used herein shall be construed to mean the parents and guardians of children in attendance at the school and, whether parents or guardians or not, qualified electors residing in the attendance district of the school."

See Quarterly Report of the Attorney General, Volume III, page 88.

It seems to be the legislative intention that, when by proper proceedings schools are consolidated, trustees for the consolidated school shall be nominated by the patrons thereof and appointed by the County Board of Education; and that thereupon the authority and duties of the trustees of the several consolidating schools shall cease. Compare Biennial Report of the Attorney General, 1928-30, page 307.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 4, 1937.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

County governing body can legally appropriate county funds for the purpose of leasing office space necessary to accommodate agencies of the county government. The price of the lease may be paid in a lump sum.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I acknowledge receipt of your letter of May 12, 1937, which is as follows:

"Butler County has no adequate office accommodations for the Public Health Department; the Public Welfare Department, and the Agricultural Extension Department and the City of Greenville, with the assistance of W. P. A. is erecting a public building on a large lot owned by the City and in which when completed there will be sufficient office space for the above mentioned agencies.

It is proposed that the County shall contribute the sum of \$5,000.00 toward the cost of the building, in consideration of which the City will execute a lease to the County for a term of twenty-five years on the entire second floor of the building.

"I shall appreciate your advice as to whether the County would be authorized to appropriate funds for the purpose mentioned from available monies in the general funds not otherwise appropriated."

I am of the opinion that your inquiry must be answered in the affirmative.

Section 6755, Code of Alabama, 1923, as amended (See Michie's Code) is, in part, as follows:

"6755. Authority of court.—The court has authority—1. To direct and control the property of the county as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, including the circuit judge, if resident in the County, and to change the location of the courts, and the designation of the rooms for offices, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of court. **In the event the court-house is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and pay the rental from the county fund.** * * *" (Emphasis ours)

This office has heretofore held that the county governing bodies are authorized to lease buildings for the use of the departments of the county government in cases where the courthouse is not adequate. It is true that those opinions contemplated a monthly rental payment but I can see no reason why the county governing body could not provide for payment of

the rental in a lump sum as is contemplated in the instant case. **Biennial Report of the Attorney General, 1932-34, p. 595; Biennial Report of the Attorney General, 1932-34, p. 629.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 7, 1937

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

License taxes—Record filing tax—

Deed and mortgage filing taxes (Schedule 46 and sub-section (c) of Schedule 94 of Section 348 of the Revenue Act of 1935) should be collected on deed reserving vendor's lien when the same is offered for record, but the mortgage tax provided by Sub-section (c) of Schedule 94, supra, should not be collected on mortgage subsequently filed securing same interest secured in vendor's lien contained in deed on which mortgage tax has previously been paid.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of March 16, 1937, which follows:

"A certain instrument known as a deed with a vendor's lien was filed in the Probate Office of Clarke County for record. A deed tax was charged on the amount recited to have been paid in cash, and mortgage tax was charged on the balance as shown by the vendor's lien. On the same day a mortgage was filed for record on the same property and the mortgage covered the exact amount as was covered by the vendor's lien in the deed. Exactly the same person gave the mortgage that gave the deed with the vendor's lien. Should the Probate Judge have charged a mortgage tax on the mortgage, as a mortgage tax had already been charged on the amount in the vendor's lien?"

The statements contained in your letter show that you collected the proper tax, or taxes, on the deed with a vendor's lien which was offered for record in your office. See opinion of the Attorney General to Hon. W. G. Little, Judge of Probate, Sumter County, Livingston, Alabama, under date of January 9, 1936, Quarterly Report of the Attorney General, Vol. 11, at page 23.

The mortgage referred to in your letter, which covered the exact amount as was covered by the vendor's lien in the deed and was executed between the same parties who executed the deed with the vendor's lien, should have been accepted for record without the payment of the mortgage tax, inasmuch as you had previously collected the mortgage tax when you recorded the deed with the vendor's lien.

Sub-section (c) of Schedule 94 of Section 348 of the Revenue Act of 1935 provides:

"That when any deed is filed for record which recites that part of the purchase money is unpaid, such deed to the extent of such unpaid balance shall be held and treated as a mortgage, and the mortgage tax shall be collected by the Judge of Probate in addition to the tax for recording the instrument as a deed before recording the same, unless said balance of purchase money shall be secured by mortgage or deed trust which has already been filed for record, and the tax thereon paid, and the fact of such prior payment shall be endorsed on the deed. When any such deed is recorded and the tax thereon is paid, and thereafter a mortgage securing the debt is filed for record, the same shall be admitted to record without the payment of the mortgage tax and the fact of such prior payment shall be endorsed on the deed." (Emphasis ours).

I call your attention particularly to the last sentence of the above quoted sub-section, which shows conclusively that the mortgage referred to in your letter should have been accepted for record without the collection of the mortgage tax levied by that sub-section.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 7, 1937

Hon. R. J. Westbrook,
Clerk Circuit Court,
Linden, Alabama.

1. Trial tax cannot be charged in forfeiture case against the defendant in bail
2. The charge for final record on forfeiture case against defendant in bail is \$.50. For final record of the original criminal case the Clerk is entitled to \$.15 per one hundred words.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 20, 1937, in which you request my opinion as follows:

"Is a trial tax chargeable in a case where a forfeiture has been taken if he has already paid a trial tax in a suit prior to the suit where the forfeiture was taken against him and his bondsmen. Should this trial tax be refunded if you say it is not chargeable in the above mentioned case.

"What should the charge be for final record in a case where a forfeiture has been taken, criminal. Is there any certain price for a final record in criminal cases."

Answering your first request, I call your attention to Section 9 of the 1935 Revenue Act, which is, in part, as follows:

"* * * nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax fee has been imposed, and

cases for municipal assessments shall not be subject to such tax, and tax cases."

This section says, as you will note, no trial tax can be charged in any ancillary proceeding where a trial tax has been imposed in the original case. Certainly forfeiture on a criminal bond is an ancillary proceeding where a trial tax is chargeable in the original case. Therefore, such proceedings could not be subject to this tax. Biennial Report of the Attorney General, 1932-34, page 390.

As to your second inquiry, I call your attention to Section 3739, Code of Alabama, 1923, where it says:

"Final judgment of forfeiture against the defendant—\$.50."

Therefore, you can only charge fifty cents for final record on a forfeiture against defendant in bail. Again I call your attention to Section 3739, supra, where it says:

"Final record, for each hundred words—\$.15."

Therefore, in making your final record in the original criminal case against the defendant you would be entitled to fifteen cents for each one hundred words contained in said record.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 7, 1937

Dr. J. N. Baker,
State Health Officer,
Department of Public Health,
Montgomery, Alabama.

Ordinance regulating sale of milk held constitutional.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of May 3rd, 1937, in which you request my opinion as follows:

"On March 22, 1937, the Florence, Alabama, City Commission adopted, at the suggestion of the State and County Health Department, several amendments to the Florence milk ordinance, one of which reads as follows:

" 'In milk plants in which ice cream mix is made or frozen, only raw milk and milk products of Grade B or better quality, or, if pasteurized, of Grade A Pasteurized quality, may be received into the establishment. Sweet cream of quality lower than Grade B raw or Grade A Pasteurized must be sweetened by the addition of eight pounds of cane sugar per forty quart can of 40 per cent cream, before entry into the establishment.'

"The object of this amendment is to forestall the use of low grade products, ostensibly purchased for the making of ice cream mix, in fluid milk or cream for market distribution.

"The adoption of this particular amendment was opposed on the ground that it is discriminatory, in that similar restrictions are not applied to other ice cream manufacturers in Florence, who do not also pasteurize milk. However, the purpose of this amendment is to enable the health department to safeguard the milk supply of the community, and is, therefore, not directed at ice cream manufacture in general.

"In view of the fact that enforcement of this amendment may be enjoined on the ground of discrimination and we are agreeable to amendment of this amendment in order to spare the City of Florence the expense of the defense of an injunction procedure, I am hereby requesting your opinion as to the validity of the quoted amendment, and your suggestion as to re-wording in event you deem it discriminatory in its present form."

In my opinion the ordinance in question is constitutional. The constitutionality of milk regulations has many times been upheld. Annotations: 18 A. L. R. 235, 42 A. L. R. 556, 58 A. L. R. 672; 80 A. L. R. 1225. A very similar case was presented to the Supreme Court of the United States in the case of *St. John v. New York*, 201 U. S. 633; 50 L. ed. 896. In that case the statute of New York in question defined adulterated milk as milk containing less than 12 per cent of milk solids and less than 3 per cent of fat, and it was made a crime for any person to sell any adulterated milk. Other provisions of the statute provided that if a producer of milk could satisfy the Commission of Agriculture by sample that the milk was in its natural state, he was not subject to prosecution for selling adulterated milk. *St. John* was a non-producing wholesale and retail milk dealer and exposed for sale a quantity of milk containing less than 12 per cent milk solids. He sought to prove by sample that the milk was in the same condition when taken from the herd of the producer, which privilege was allowed under the statute to producers of milk, but not to other venders. The Supreme Court said:

"The contention of plaintiff in error is that non-producing venders are discriminated against, and hence denied the equal protection of the laws, contrary to the provisions of the 14th Amendment of the Constitution of the United States, in that they may not, as producing venders may, exempt themselves from actions or penalties by showing that the milk sold or offered for sale by them is in the same condition as when it left the herd of the producer.

"It has been decided many times that a state may classify persons and objects for the purpose of legislation. We will assume the cases are known and proceed immediately to consider whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose. * * * The purpose of the law is to secure to the population, adult and infant, milk attaining a certain standard of purity and strength.

"All other milk is declared to be 'unclean, impure, unhealthy, adulterated, or unwholesome.'

"It is not contended that such purpose is not within the power of the state, but it is contended that the power is not exercised on all alike who stand in the same relation to the purpose, and quite dramatic illustrations are used to show discrimination. A picture is exhibited of producing and non-producing venders selling milk side by side; the latter, it may be, a purchaser from the former; the act of one permitted, the act of the other prohibited or penalized. If we could look

no further than the mere act of selling, the injustice of the law might be demonstrated; but something more must be considered. **Not only the final purpose of the law must be considered, but the means of its administration,—the ways it may be defeated.** Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and its penalties adjusted. As the standard established can be proved in the hands of a producing vender, he is exempt from the penalty; as it cannot certainly be proved in the hands of other venders so as to prevent evasions of the law, such venders are not exempt. In the one case the source of milk can be known and the test of the statute applied; in the other case this would be impossible, except in few instances. Through penalty on the non-producing vender the producer is ultimately reached, though he may seem to be indulged."

As I understand the facts set out in your letter, the ordinance in question was passed for the purpose of safeguarding the milk supply of the community by preventing the use of low grade products, ostensibly purchased for the purpose of ice cream mix, in fluid milk or cream for market distribution. Applying the reasoning of the Supreme Court in the case above cited, the means of administration of the ordinance must be considered and it would not seem to be an arbitrary classification to require a higher standard of milk plants handling both ice cream mix and milk for human consumption and ice cream manufacturers who do not handle milk for human consumption.

I note in your letter that the City of Florence wishes to spare the expense of a defense of an injunction proceeding. Of course, it would be somewhat expensive to have to defend such proceeding, even though the ordinance be constitutional. It is, therefore, my suggestion that if the only claim of discrimination is that the restrictions do not apply to other ice cream manufacturers, the ordinance be amended by adding the words "in milk plants in which ice cream mix is made or frozen" the following words: "and all plants manufacturing ice cream."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 7, 1937

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

1. Medical Association of the State of Alabama an instrumentality of the State.
2. Such Medical Association not liable for Federal Security Taxes.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date, in which you request my opinion as follows:

"There is a probability that question will arise regarding liability of the Medical Association of the State of Alabama for the payment of taxes under the Federal Revenue Act of 1936 and previous years and under the Federal Social Security Act. The Association's governing body, of which the writer is Secretary, does not consider these legislative measures applicable to the organization for the following reasons:

"1. The Association is a part of the State Government (Section 1046, Code of 1923; 204 Ala. 455—86 So. 28).

"2. It is organized and operated exclusively for 3 purposes:

(a) For the direction and control of the public health affairs of the State;

(b) For the regulation and control of medical licensure and the Medical Practice Act of the State;

(c) For the advancement of medical science in Alabama.

"3. Its paid employees are 2 part-time individuals, namely, a Secretary and a Treasurer, whose duty it is to look after the clerical and financial affairs of the Association as a scientific body; and who devote no specified periods to the responsibilities of their respective offices.

"It will be appreciated if you will express opinion as to the Association's liability in the premises."

In the case of **Parke v. Bradley**, 204 Ala. 455, 86 So. 28, the Supreme Court considered at length the history of the organization of the Medical Association of the State of Alabama. Set out in that decision are excerpts from the Constitution of that Organization. After considering the Code provision application (Section 1046, Code of Alabama of 1923) the Supreme Court said:

"We are of the opinion, having regard to its organization, aims and activities, and its relation to the State Board of Health and to the public welfare in general, it is a quasi public corporation, charged with duties and responsibilities which it cannot evade."

Under the express provisions of Code Section 1046 referred to, the Medical Association of the State of Alabama is constituted the Board of Health of the State of Alabama.

Your inquiry does not refer to what taxes under Federal Revenue Act of 1936 are claimed to be a liability upon the Medical Association of the State of Alabama. It is not the policy of this office to render opinions in answer to general inquiries. Without a more particular reference to the kind of taxes referred to, I would have to consider each Section of the entire "Federal Revenue Act of 1936 and previous years." Without examining each Section of these Federal Revenue Acts, I can only advise you that I know of no Section which places liability for taxes upon the Medical Association of the State of Alabama.

There are three tax sections under the Federal Social Security Act. These are 42 U. S. C. A., Section 1001, Section 1004 and Section 1101. Under the definitions given in 42 U. S. C. A., Section 1011 and Section 1107, there are expressly exempted services performed as an employee of a State, political subdivision or an instrumentality of a State or political subdivision thereof and service performed in the employ of a corporation, community chest fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes.

In my opinion, the above decision and Section 1046 lead to the conclusion that the Medical Association of the State of Alabama is an instrumentality of the State or political subdivision thereof and is therefore exempted from Social Security Taxes. It would also seem to be exempted under the latter exemption clause cited above as a corporation organized and operated exclusively for religious, charitable, scientific or educational purposes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 7, 1937

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Code Section 9023—Judge of Probate may not require fee for attestation to be paid at time of filing power of attorney for record.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of May 17, 1937, in which you request my opinion as follows:

"I would like to have your official opinion on the following question:

"A power of attorney is presented to me as Probate Judge for recordation, this power of attorney authorizing some named individual to cancel of record a real estate mortgage. Is the Probate Judge authorized to require, at the time such power of attorney is offered for record, payment of an additional fee of twenty-five cents over and above the cost of recording the power of attorney, to cover the attestation of the cancellation to be subsequently made under authority of the power of attorney?

"In other words, may the fee of twenty-five cents referred to in Section 9023 of the Code of Alabama be collected at the time a power of attorney to cancel a mortgage is filed of record, or may such fee of twenty-five cents be collected only when the Probate Judge is called upon to actually attest the entry of satisfaction and cancellation?"

In my opinion your inquiry should be answered in the negative. It has been ruled by this office that the Judge of Probate is entitled to his fee for attesting only where such attestation is made. Quarterly Reports, Vol. III, p. 24. This opinion further held that the Judge of Probate was not required to attest satisfaction under Code Section 9023, unless satisfaction is made pursuant to written demand by the mortgagor. As such written demand for attestation may or may not be made, it is impossible for you to determine in advance that such fee will be earned, and you are not authorized to collect a fee for attestation when the power of attorney is filed for record, but only when called upon to attest entry of satisfaction.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 7, 1937

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Property of Carpenters Local Union No. 103 not exempted from taxation.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"I am enclosing herewith a copy of a letter received from Mr. R. W. Murphree, Business Agent of the Carpenters' Local Union No. 103, Birmingham, in which they ask to be exempt from taxation for the reason that their building is owned by them and used exclusively for fraternal and educational purposes of the Union.

"Please advise me if they are tax exempt."

According to the facts set out in the letter attached to your inquiry, Carpenters' Local Union No. 103 purchased certain property where they have meetings for passing out various information to their members, educating them in their line of work, and the instruction of the apprentices in the workings of the tools of their craft and Union principles.

Provisions are strictly construed against exemption and in favor of the right to tax and property is not to be exempted unless the legislative intent to exempt clearly appears. *State v. Wright*, 224 Ala. 357, 140 So. 584, *State v. Tuscaloosa Cotton Seed Oil Co.*, 208 Ala. 610, 95 So. 52, *State v. Elba Bank and Trust Co.*, 18 Ala. App. 253, Cert. Den. 207 Ala. 711, 91 So. 922.

Section 2 (a) of the Revenue Act of 1935 provides for an exemption of all property used exclusively for religious worship, for schools or for purposes purely charitable. Section 2 (d) provides for exemption of all property of literary and scientific institutions and literary societies, when employed or used in the regular business of such institutions. In my opinion,

the facts set out in your letter and the letter attached thereto do not bring the Carpenters' Local Union No. 103 clearly within the exemption of this statute and it is therefore my opinion that their property is not exempted from taxation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

June 7, 1937

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Local Act of Special Session for 1936. Act No. 11—Escambia County. Funds collected under said Act.

(1) Act requires County Tax Collector of Escambia County to deposit aforementioned funds to credit of and in the name of the Escambia County Health Department and such deposit to be made in the bank used, or with the Treasurer designated, by the county as its depository.

(2) State Health Officer of Alabama as the chief executive officer of the Alabama State Board of Health, is given the right to disburse the funds for lawful purposes by proper order signed by him and drawn on said depository. The county officials do not have such authority.

(3) County officials do not have the authority to direct the State Board of Health in the use of the funds; or to forbid the use thereof.

(4) County officials are not authorized to include any part of said funds in their budget required by the County Financial Control Act for the purpose of exercising control over said funds.

(5) The aforementioned Act includes funds collected pursuant to the Act for the tax year 1936-1937, as well as for subsequent tax years.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which is quoted as follows:

"Reference is made to Act No. 11, General and Local Acts, Special Session, 1936, page 8; and to an opinion rendered by you on March 16, 1937. In connection therewith, please answer the following questions:

"1. Does the Act require the Tax Collector to deposit the money mentioned in the Act to the credit of the County; or to the credit of and in the name of the Escambia County Health Department, or both?

"2. In what banking institution does the Act require the money to be deposited?

"3. If you state that the money should be deposited to the credit of the Escambia County Health Department, does the State Health Officer, as the executive officer of the State Board of Health, have the lawful authority to disburse said money for lawful purposes by proper order signed by him and drawn on said depository? Do the county officials have such authority?

"4. After said money has been so deposited, do the county officials have any authority to direct the State Board of Health in the use of the money; or to forbid its use?

"5. Should the county officials incorporate or include any part of said money in its budget required under the County Financial Control Act for the purpose of exercising control over said funds?

"6. Does the aforementioned Act include funds collected during the tax year 1936-1937, as well as subsequent years?"

The Act referred to in your letter contains Sections 1 to 5 inclusive. I quote the sections as follows:

"Section 1. That the Court of County Commissioners of Escambia County shall for the tax year commencing October 1st, 1935 and ending September 30th 1936, and each and every tax year thereafter, levy a special tax of one-twentieth of one per cent on the value of all taxable property in Escambia County as assessed for taxation by the State, the tax so levied and collected to be held and used exclusively for public health work in Escambia County by the Escambia County Health Department, in maintaining and operating an all the time health unit in Escambia County; Provided, however, that no levy shall be made by the said Court of County Commissioners in any one year exceeding one-half of one per cent. for the ordinary county purposes, including the levy herein provided but not including levies authorized by the Constitution and Statutes of Alabama for necessary public buildings and bridges.

"Section 2. That such taxes so levied and collected as herein authorized shall be, and hereby are fixed as Escambia County's contribution to the budget of the Escambia County Health Department.

"Section 3. That all taxes levied and collected as herein provided shall be paid over and deposited by the Tax Collector of Escambia County in the county depository of said county to the credit of the Escambia County Health Department, and shall be paid out for its operation and maintenance by, or under the direction of the State Board of Health, as other claims are paid out of said budget.

"Section 4. That if any part hereof shall be declared invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the remainder of this law.

"Section 5. This bill shall go into effect immediately upon its passage and approval by the Governor."

With refenece to question number one which you propound, it is my opinion that the Act requires the tax collector of your county to deposit the money collected by him pursuant to the terms of the Act to the credit of and in the name of the Escambia County Health Department and that he is not authorized to deposit the money to the credit of or in the name

of the county, nor jointly to the credit of the County and the Escambia County Health Department. The deposit should be made in the bank used, or with the treasurer lawfully designated, by the county as its depository. The Act is in my judgment clear and unambiguous in directing the tax collector as I have just outlined and stated. These directions are contained in Section 3 of the Act.

Answering question three which you propound, it is my opinion that the State Health Officer of Alabama, as the chief executive officer of the Alabama State Board of Health, is given the right to disburse the funds for lawful purposes and he is authorized by proper order signed by him and drawn on said depository to withdraw the funds for lawful use. The county officials are not given such authority.

Referring to interrogatory number four, it is my opinion that the county officials do not have any authority to direct the State Board of Health in the use of the money; or to forbid its use. Likewise, the Legislature by the terms of the Act saw proper to permit the State Board of Health to use their discretion, within lawful bounds, as to how the money should be used and they failed to grant the county officials any voice in the matter.

Again I must answer in the negative. The county officials are not authorized or empowered to incorporate or include any part of said funds in their budget required under the County Financial Control Act for the purpose of exercising control over said funds. I do not mean to say that the county might not be permitted to show a collection and an appropriation thereof, but if such incorporation is made for the purpose of exercising control over the funds, then such inclusion cannot be made.

Directing your attention to question six of your letter, it is my opinion that the Act includes funds collected pursuant to the terms of the Act during the year 1936-1937, as well as subsequent years. Section 1 of the Act is a mandate to the Court of County Commissioners of Escambia County to levy a special tax for the tax year commencing October 1, 1935 and ending September 30, 1936, and for each and every tax year thereafter. The mandate is clear and is free from any ambiguity in directions to the county commissioners as to what years the levy shall be made.

It seems to me that it was the purpose and intention of the Legislature in the adoption of the Act to compel the County Commissioners to levy a tax within constitutional limits for the health work as set forth in the Act. Also it was the intention of the Legislature to appropriate the tax so levied and not leave it to the discretion of the County Commissioners to make the appropriation. I further conclude that the Legislature did not want the funds so levied and collected to be mixed with the county funds. Such intention is evidenced by the specific requirement that the funds be deposited by the tax collector to the credit of Escambia County Health Department. The only requirement made was that the money be deposited in the County depository. The Legislature no doubt thought that the County depository would be safe; hence its designation. The specific direction that the money shall be deposited to the credit of the Escambia County Health Department within itself excludes a deposit thereof to the credit of the county, or to the joint account of the county and the County Health Department. The specific mandate of the Act that the money shall be deposited to the credit of the Escambia County Health Department excludes any idea or intent on the part of the Legislature to vest control thereof, directly or indirectly, in the county officials.

There is nothing by the terms of the Act which denies the Escambia County Commissioners the right to mention or incorporate the proceeds

derived from the levy in their budget, but such inclusion must necessarily be made for the purpose of showing county participation in health work and not for the purpose of exercising any control over the funds. The funds so collected in reality have never become a part of the general funds of the county which are required to be budgeted by the terms of the County Financial Control Act. Therefore, the funds so levied and collected are not a part of those funds required to be included in the county budget, but they may be listed for the purpose of showing county participation in health work.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

June 7, 1937

Hon. Howard Kirby, Clerk
Circuit Court of Etowah County,
Gadsden, Alabama.

Fines & Forfeitures—

Fines and forfeitures held payable in Etowah County in witness tickets or script.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request of recent date requesting my opinion as follows:

"Herewith I am enclosing copy of opinion rendered by The Court of Appeals of Alabama in case of F. W. Reid, Ex-Officio Clerk, etc. v. Ernest Wallace. Appeal from Blount County, to be used for reference in connection with my request for opinion from the Attorney General's Office as hereinafter stated.

"Would it be legal for me the same as it is for Clerk of the Circuit and County Courts of Blount County, to tender or remit Fine and Forfeiture Claims vs. Etowah County to the County Treasurer in payment of Fines due the County which have been assessed in Circuit and County Courts?"

In reply, I wish to advise you that in my opinion, Fine & Forfeiture imposed as punishment in Etowah County are payable in script or state witness tickets.

I wish to refer you to Section 4, of the Acts of 1882-1883, page 547, which provides as follows:

"That State witness tickets payable out of the fine & forfeiture fund, solicitors' and sheriffs' claims payable out of said fund, shall be receivable for any fines and forfeitures due the county, at the value expressed by said tickets and officers' claims; and when the same shall be paid into the county treasury, bank, or other place of deposit, the county treasurer or any other person acting as such, shall mark on his registry of said claim that the same is paid, the date and to whom; but no officer's claim, made out and sworn to according to the provisions of this act, shall be received by installments or part payments thereof,

unless the same shall have been presented to the court of county commissioners or board of revenue; and warrants therefor in fractional parts, against said fund, issued by such court or board, which warrants shall bear the same date as to registrations the original claims had; and the county treasurer or any other person or persons acting as such, shall cancel on his registry the original claim; PROVIDED, that when the county treasurer, or other person or persons acting as such, shall pay money out of the county treasury belonging to the fine and forfeiture fund, he shall first pay the registered State witness tickets, payable out of said fine and forfeiture fund."

I wish to further refer you to the case of **Reid v. Wallace** 168 So. 900 and to the authorities cited therein.

You will note that this case, which is directly in point with your question as propounded, definitely states that in the opinion of the Court of Appeals of Alabama, which opinion was rendered June 9, 1936, fines and forfeitures are payable in witness tickets or script in the counties of Barbour, Elmore, Autauga, Blount, Etowah and Chambers. The Court further holds that the provisions of the Acts of 1882-83, page 548 are not repealed by Section 4038 of the Code of 1923.

Premises considered, it is my opinion that fines and forfeitures are payable in witness tickets or script in Etowah County. I wish to further refer you to an opinion of this office under date of January 15, 1937, addressed to Hon. G. R. Lovell, Deputy Sheriff, St. Clair County, Pell City, Alabama and to the authorities cited therein, copy of which opinion I attach hereto for your convenience.

Yours very truly,

A. A. CARMICHAEL,
Attorney General

June 7, 1937

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Pensions— Proceeds of warrant due to estate of deceased Confederate Veteran who was married two years prior to his death and who leaves no minor children, should be disbursed according to the provisions of Section 2969, Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 10, 1937, in which you request my opinion as follows:

"Please give me an opinion as to the following: What disposition should be made on July 1, next of the proceeds of a quarterly pension warrant due to a Confederate Veteran who has died since April 1st, and whose widow was married to him about two years ago and there being no minor children. I refer you to Section 2969 of the Code of 1923 and to later Acts of the Legislature."

In reply, I wish to advise you that in my opinion the disposition of the proceeds of the quarterly pension warrant due to a Confederate Veteran under the circumstances which you have outlined in your letter is according to the provisions of Section 2969 of the Code of 1928, (Michie's Code).

I note that you say this Confederate Veteran leaves a widow who had been married to him about two years at the time of his death and that there are no minor children surviving the veteran. In my opinion, the widow of this veteran will not be entitled to any part of the pension proceeds. I refer you to Section 2938 of the Code of 1928 (Michie's Code), which provides as follows:

"2938. WIDOWS OF SOLDIERS AND SAILORS ENTITLED TO PENSION.—The widow of any soldier or sailor in the service of the State of Alabama or the Confederate States of America such as is set forth in the preceding section, who was married to such soldier or sailor prior to January 1st, 1903, and who has not remarried since the death of such soldier or sailor as whose widow she makes application for pension, and who was not at the time of her husband's death separated from him by divorce or was not voluntarily living apart from her husband during the period of one year prior to his death and whose husband did not desert the service of the State of Alabama, or of the Confederate States, and who at the time of filing said application does not own real or personal property or both to the value of five thousand dollars, whether in fee simple or life interest therein or whose income from all sources does not exceed twelve hundred dollars per annum, who is an actual bona fide resident of Alabama and has been such for a period of three years prior to the filing of said application shall be entitled to relief under the provisions of this article."

You will note that under the provisions of the above quoted section 2938 the widow of the Confederate Veteran is not entitled to be placed on the pension roll or to receive the proceeds of the veteran's pension unless she was married to him prior to January 1st, 1903. It is, therefore, my opinion that the proceeds of the warrant to which you refer in your request should be disposed of according to the provisions of Section 2969 as follows:

"ON DEATH OF PENSIONER DELIVERY OF NEXT QUARTERLY PAYMENT.—Should a pensioner die leaving a widow who would be entitled to a pension under the provisions of this article, or if there be no widow, leaving a minor child or children, or should a widow die leaving a minor child or children, the probate judge shall deliver the warrant of the next quarterly issue, succeeding the death of said pensioner, to the widow, or if there be no widow, to the minor child or children of such pensioner, and should there be no widow or minor child of such deceased pensioner, the probate judge shall endorse such fact on the pension warrant and collect the same and apply the proceeds, first to the payment of the burial expenses, and second, to the expenses of the last illness of the pensioner, attaching thereto a receipt or statement of payment of such expenses." (Emphasis ours).

I wish to further refer you to Biennial Report of the Attorney General, 1930-32, page 567.

Yours very truly,

A. A. CARMICHAEL,
Attorney General

June 7, 1937

Hon. T. W. Shields,
Sheriff, Marengo County,
Linden, Alabama.

Sheriff or other peace officers are entitled to their transfer fees for transferring a defendant in a misdemeanor case from one county to another, regardless of by whom the warrant was issued.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 16, 1937, in which you request my opinion as follows:

"Please advise me whether or not this county is liable for a removal bill for bringing a prisoner, who is charged with a misdemeanor, from the jail in another county to the jail in this county on a warrant issued by the County Court Judge.

"Section No. 3741 of the Code of 1923 states that I would be entitled to pay for removal of a prisoner on a warrant issued by a justice of the peace, or on an indictment, but does not mention the county court."

My answer to your request is in the affirmative. I am aware of the fact that Section 3741, Code of Alabama of 1923 says, among other things, "on warrants issued by justices of the peace or on indictments," but I find that the County Court has jurisdiction concurrent with the Circuit Court of all misdemeanors committed in the county. Under Section 3815, Code of Alabama of 1923, we find cases are brought in the County Court by warrants or affidavits issued by the Judge of the County Court or by justices of the peace, made returnable to the County Court and while Section 3741, *supra* says "on warrants issued by justices of the peace or on indictments," I cannot but believe that this section refers to the transfer of parties charged with misdemeanors rather than to the officers issuing the warrants. To hold otherwise would virtually destroy the County Courts. I think the thing uppermost in the mind of the Legislature was to provide a method of bringing parties charged with misdemeanors back to the county for trial and they were not interested so much in the officers issuing the process and, therefore, it applies to cases sworn out before justices of the peace, Judge of County Court or any other officer authorized to issue warrants or affidavits on misdemeanors.

Yours very truly,

A. A. CARMICHAEL,
Attorney General

June 11, 1937

Board of Revenue & Road Commissioners,
Mobile County,
Mobile, Alabama.

Mobile County—Operation under Constitutional Amendment (General Acts of Alabama, 1935, page 810) Construction of Amendment.

1. Legislature not constitutionally authorized to increase fixed expenses payable from general funds of Mobile County, after budget has been fixed and constitutional maximum absorbed therein.

2. Salary increase authorized by legislature after maximum budget, in accordance with the Constitution, has been made violative of Constitutional Amendment, *supra*, to the extent that it seeks to impose additional burden on budget during that year.

3. (a) County cannot refuse to pay fixed expenses which exceed budget allowance, but must reallocate funds and shift the appropriations in budget so as reasonably to assure payment of fixed expenses in order of their governmental priority.

(b) Governmental functions of Mobile County must continue in order of their lawful priority until funds therefor are exhausted.

(c) There is no law in Alabama which requires citizens to perform public services without pay if statute provides pay therefor.

(d) Charge against general funds of Mobile County for public services must be paid in order of governmental priority from surplus which accrues for fiscal year to which surplus belongs, but is not a charge against a surplus for any subsequent year.

4. Board should resort to all statistical data available from prior years in their effort to ascertain governmental expenses described in paragraph three of inquiry and from such data and by use of their own reasonable estimates of possible increases over such prior expenses, fix and determine an allocation for such expenses.

5. Circuit Judges have lawful authority to add clerks pursuant to Local Act of 1936, p. 61, after annual maximum budget has been fixed, but payment therefor cannot be made unless budget contains a surplus or unless funds not necessary to carry on and maintain prior functions of government are available.

6. The Board may amend the budget, provided the constitutional maximum is not disturbed, but only for the purpose of reallocating a prospective surplus which may exist in an appropriation, or for the purpose of providing funds for governmental functions in the order of their priority as fixed by law.

7. If fixed expenses required by law exceed constitutional limit for the budget, board must allocate funds to meet such expenses in order of governmental priority, and to base all estimates of uncertain items of expenses on statistical data for such expenses during prior years and on reasonable estimate of current increase or decrease.

8. Board is under no duty, unless reasonably certain there will be a surplus from an existing budget to pay appropriations made by the legislature out of general funds, such as bills for relief, as such legislative appropriations to the extent that they disturb a fixed annual budget is violative of the constitutional amendment, *supra*.

Opinion by Assistant Attorney General Simmons.

Gentlemen:

Reference is made to your letter of February 17, 1937, directed to this office by Geo. A. Sossaman, Attorney for your Board, which I quote as follows:

"I am directed by the Board of Revenue and Road Commissioners of Mobile County to request your opinion upon the following questions:—

"1. May the Legislature increase the fixed expenses of Mobile County during any fiscal year when no provision therefor has been made in the budget and said budget equals 95% of the actual income of the preceding year.

"2. When the Legislature enacts a bill increasing a salary of any official which salary is payable out of the funds of Mobile County, can such law become effective before the first day of the following October, where no provision has been made for such increase in the budget and the budget equals 95% of the actual income of the preceding year.

"3. When the law requires the payment of certain expenses such as jury and witness certificates, election expenses, transportation of delinquent children, salaries of state examiners, fees for guarding and feeding prisoners, bedding for the jail, water for the jail, fees of the sheriff, and these expenses exceed the sum set up in the budget, and the budget equals 95% of the actual income of the preceding year, should the county refuse to pay any additional sums above that set up in the budget, and if not must these services cease or must they be performed without pay, or is the charge therefor a claim against the treasury whenever a surplus appears therein.

"4. In fixing the budget, what is the duty of the Board in regard to setting up a sufficient sum to meet the aforesaid charges during the coming year.

"5. May the Circuit Judges add clerks in compliance with the provisions of Local Acts of the Legislature of 1936 page 61, during any fiscal year, when no provision is made in the budget for such additional employees.

"6. May the Board amend the budget, from time to time, shifting, raising and lowering various items provided it does not exceed the maximum set by law.

"7. How may the Board make up a budget if its fixed expenses as required by law exceed 95% of its income for the preceding year, and particularly where a part of this expense is the payment of certain indefinite sums which cannot be ascertained at the time of the adoption of the budget.

"8. What is the duty of the Board in regard to the payment of appropriations made by the Legislature out of county funds, such as bills for relief, where no provision is made for such appropriations in the budget and the budget is set at the maximum allowed by law."

In answer to the question set forth in the above quoted letter, I have reached the following conclusions:

1. Legislature exceeds constitutional authority if it attempts to increase fixed expenses payable from General Funds of Mobile County after budget has been fixed and the constitutional maximum absorbed therein.

2. Salary increase payable from general funds of Mobile County, directed by legislative enactment after maximum budget, pursuant to mandate of constitutional amendment, has been made is violative of constitutional amendment, supra, to the extent that it seeks to impose additional burden on the budget during that year.

3. (a) County has no authority to refuse to pay fixed expenses which exceed budget allowance, but must reallocate funds and shift appropriations in budget so as reasonably to assure payment of fixed expenses in order of their governmental priority.

(b) Governmental functions of Mobile County must continue in the order of their lawful priority until funds therefor are exhausted.

(c) There is no law in Alabama which requires citizens to perform public services without pay if statute provides pay therefor.

(d) Charge against General Fund of Mobile County for public services must be paid in order of governmental priority from surplus which accrues for fiscal year to which the surplus belongs, but is not a charge against a surplus for any subsequent year.

4. Board should resort to all statistical data available from prior years in their effort to ascertain governmental expenses described in paragraph three of inquiry and from such data and by use of their own reasonable estimates of possible increases over such prior expenses, fix and determine an allocation for such expenses.

5. Circuit Judges, charged with notice as they are that the Board is required to fix a budget in accordance with constitutional mandate have lawful authority to add clerks in compliance with the provisions of Local Act of Legislature of 1936, p. 61, after annual maximum budget has been fixed, but payment therefor cannot be made unless budget contains a surplus or unless funds not necessary to carry on and maintain prior functions of government are available.

6. The Board may amend the budget, from time to time, shifting, raising and lowering various appropriations, provided the constitutional maximum is not disturbed, but only for the purpose of reallocating a prospective surplus which may exist in an appropriation, or for the purpose of providing funds for governmental functions in the order of their priority as fixed by law.

7. The constitutional amendment does not give detailed instructions which Board must follow in preparing the budget, but if fixed expenses as required by law exceed constitutional limit for the budget, it is then the duty of the Board to allocate funds to meet such expenses in the order of governmental priority and to base all estimates of uncertain items of expenses on statistical data for such expenses during prior years and on reasonable estimate of current increase or decrease.

8. Board is under no duty, unless reasonably sure there will be a surplus from an existing budget, to pay appropriations made by the Legislature out of General Funds, such as bills for relief, as such legislative appropriations to the extent that they disturb a fixed annual budget is violative of the constitutional amendment, supra.

The inclusion in the amendment of a provision that "the Legislature shall not, after the adoption of this amendment, pass any law making any claim a preferred claim against said county and all laws and parts of laws now in force and effect making a preferred claim against said county, are hereby annulled as to any future claim" was not in my judgment intended to preclude the governing body of Mobile County from allocating the funds so as to take care of governmental functions in the order of their priority. It was the purpose and intention of the legislature when the amendment was authorized to be submitted to the people for ratification and it was the intention of the amendment that due preference should be given to these

governmental functions in order of their priority. Therefore, I think it the duty of your board to recognize and observe these intentions.

In the statement that I have made to the effect that the legislature has no lawful authority to disturb an existing budget, I assume that the budget includes and absorbs the maximum authorized according to the provisions of the amendment.

If the maximum is not absorbed or if it develops that there is a surplus over the appropriations in the budget, it is my opinion that the board should first use all or any portion of this surplus to take care of legislative appropriations or expenses imposed after the budget has been made up, and in doing so the board should observe the same rule of priority in governmental function.

It is further my opinion that the operation of the amendment is confined exclusively to general funds and does not have application to any funds of the county other than general funds.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Fines and Forfeitures—Jackson County—

1. Fines and Forfeitures in Jackson County held payable in script.
2. Local Acts 1896-97, page 870, held not repealed by the adoption of the Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 23, 1937, in which you request my opinion as follows:

"Acts of 1892-1893, page 926, provide for registration of claims against Fine and Forfeiture Fund of Jackson County, and the mode of payment and also provide for the payment of one-half of all fines in registered claims under certain provisions.

"In view of the above:

"(A) Was this Act repealed by the Code of 1923, Section 303, subdivision 5, as to registration and payment of state witness certificates from Fine and Forfeiture Fund. (See opinion Attorney General, March 5, 1935, page 270, first quarter 1936. Also Code 1923, pp 3763 & 3769.)

"(B) Is the Act repealed in toto or can fines still be paid one-half in money and one-half in registered claims against Fine and Forfeiture Fund as provided therein?"

In reply, I wish to advise you that the Act of 1892-93, page 926, referred to in your request was amended by the Acts of 1896-97, page 870. You will note that Section 3 of the Acts of 1896-97, provides for a method of registration of witness claims against the State which is contrary to the provisions of Section 303 of the Code of 1923, Subsection 5. Section 3 in Acts of 1896-97, page 870, provides as follows:

"The claims of all State's witnesses in the county court shall be issued during the term of said court and not afterward, and it shall be the duty of the presiding judge, after the adjournment of each term, to enter on the register of fines and forfeiture claims a list of all State's witness claims issued by him during the term of court last preceding and within sixty days after the approval of this act and not afterward, to enter on said register the claims of all State's witnesses presented to him, which were issued by any judge of said court prior to the approval of this Act, and after 1890. All such State's witness claims in the county court so registered shall be paid out of the fine and forfeiture fund of said county in the order of their filing as now provided by law. When the claims which have been barred under section 10 of the act approved February, 1893, and the claims of State's witnesses in the county court issued prior to 1891 are presented to the treasurer, the same shall be deposited with him and receipted for, and said claims shall be paid out of the first moneys belonging to said fund which shall come to his hands after the payment of claims pursuant to the notice published by him in January, 1897."

Subsection 5 of Section 303 of the Code of 1923 provides as follows:

"5. To number and register, in order in which they are presented, all claims against the fine and forfeiture fund which have been duly authenticated as claims against such fund, and without being audited and allowed by the court of county commissioners, such register showing the number of the claim, the date presented for registration, to whom payable, when it accrued, the character of the claim and the amount thereof; and to pay the registered claims of state witnesses in the order of their registration, and whenever there is a surplus of such fund, over and above the sum required to pay the registered claims of state witnesses, he must apply such surplus to the payment of the claims of officers of court in the order of their registration. All local laws in conflict herewith are hereby expressly repealed."

In my opinion that portion of the Act of 1896-97 quoted above is in conflict with subsection 5 of Section 303, Code of 1923 and is expressly repealed by the last sentence of said subsection 5 supra, as follows:

"All local laws in conflict herewith are hereby expressly repealed."

In my opinion, the Act is not repealed in toto and fines in Jackson County may still be paid one-half in money and one-half registered claims against the fine and forfeiture fund as provided in Section 1 of the said Act, except in those instances where the general law specifically provides for the payment of fines in money only.

I wish to refer you to Quarterly Report of Attorney General 1937, Vol. 6 page 22 to an opinion addressed to Hon. G. R. Lovell, Deputy Sheriff, St. Clair County, Pell City, Alabama, and to the authorities cited therein. I wish particularly to call your attention to the case of Reid v. Wallace, 168 So. 900, in which the court said:

"It is the settled rule of this state that repeal by implication is not favored, and unless it clearly appears that such was the inten-

tion of the Legislature in passing a general statute, local acts fixing a status will not be disturbed. *Shepherd vs. Clements*, 224 Ala. 1, 141 So. 255; *Isbel vs. Shelby County*, 10 Ala. App. 639, 65 So. 706.

"Section 4038 of the Code of 1923 appeared in the various Codes of this State, as far back as 1876, substantially as follows: 'All fines go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; a judgment therefor must be entered in favor of the State for the use of the particular county.' This Section appears in the Code of 1923 in the following language: 'All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county.' The amendment to the section as it appears in the Code of 1923 does not change the ownership of fines and forfeitures and is also qualified in its terms to the extent which allows express provisions with reference thereto.

"The local acts hereinabove referred to simply provide a method of payment in obligations of the county and in that respect has a field of operation independent of acts of the Legislature of 1927 amending section 4039 of the Code of 1923 providing for a disposition of a surplus arising from fines and forfeitures in the county treasury of any county over and above the sum required to pay the registered claims of the state's witnesses.

"Moreover, the act adopting the Code of 1923, approved August 17, 1923, specifically provides: 'Section 3. No statute which applies or relates or which was intended to apply or relate to but one county, one municipality or one other political subdivision of the State, though such statute might, strictly speaking, be classed as a general law, shall be repealed or affected in any manner by the adoption of this Code or the failure to incorporate it in the Code or a part thereof; but such statute shall remain unrepealed and be given the same force and effect as if it had been incorporated in the Code as a part thereof.' Gen. Acts 1923, p. 127. So that it would appear that in the adoption of the Code of 1923, the Legislature intended to safeguard the statutes as fixed in local communities from the general repeal by implication."

I wish to further refer you to Section 11 of the Code of 1923, which provides in part as follows:

"Local, private, or special statutes, and those public laws not of a general and permanent nature, and those which now relate to or can apply to but one county, one municipality, or one particular district, circuit or territory, and those relating to the swamp and overflowed lands, drainage districts, stump, and land-clearing districts, and those relating to the public debt, and those relating to institutions of learning, and those relating to jurisdiction and practice of courts in any division, circuit, county, or other territory less than the entire state, are not repealed by this Code."

It is therefore my opinion that payments of fines and forfeitures in Jackson County may still be made in accordance with the terms of Section 1 of the Act of 1896-97, *supra*, except as indicated heretofore in this opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Motor Carrier's Bond—Act No. 159, Article VII, Section 26, General Acts of 1932, p. 178—Probate Judge is not liable for approval of insufficient Motor Carrier's bond with personal surety.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of recent date enclosing a letter from Mr. J. S. Freeman, Chief Clerk of the Motor Carrier Department, with reference to the approval by the probate judge of bonds tendered by operators of motor carriers. I quote the letter of Mr. Freeman as follows:

"Under the 1932 Motor Carrier Act, the permits and tags for qualifying an operator are issued by the Probate Judges of the different counties and there is a provision under Section 26, Article 7, that states as follows:

" 'And, Provided further that no permit shall be issued until there has been filed with the Judge of Probate to whom the application is made, a Bond, in the penal sum of \$500.00, payable to the State of Alabama with some surety company qualified to do business in the State, as surety thereon, or with personal surety approved by the Judge of Probate, conditioned that the applicant shall pay any and all fees, taxes, or penalties which may be due under the provision of this Act.' "

"We find that in a number of cases, the Probate Judges accept and approve bonds that are of no value and in a number of cases we find it impossible to collect the mileage tax from an operator of the truck or from his bondsmen. It seems to me as the full and final authority for the approval of such bond, if placed in the hands of the Probate Judge, that it entails the duty of a Probate Judge to be assured that the bond is sufficient to guarantee the payment of any mileage tax due and if the Probate Judge approves a bond that does not furnish adequate protection to the State, the Probate Judge or his bond, should be responsible to the State for the taxes lost by his approval of an inadequate bond.

"I will appreciate it, if you will take this matter up with the Attorney General and get a ruling on this bond."

It is my opinion that the probate judge who accepts or approves an insufficient bond with personal surety tendered by the applicant as a condition to obtaining a motor carrier's license is not liable.

The Act (Section 26), *supra*, imposes upon the probate judge the performance of a judicial act by requiring him to approve the bond with personal surety.—*Beebe v. Robinson*, 52 Ala. 66; *Ex parte Harris*, 52 Ala. 87; *Ex parte Thompson*, 52 Ala. 98.

A civil action does not lie against a judge for the performance of a judicial act. "It is an unquestioned rule, founded on the public benefit, the necessity of maintaining the independence of the judiciary, and its untrammelled action in the administration of justice, that a judge cannot be held to answer any civil suit for doing, or omitting or refusing to do, an official act in the exercise of judicial power. His responsibility for the

manner in which he discharges the high trusts committed to him is to the sovereignty from whom he derives his authority. It is, also, an undisputed rule, that an officer who is charged with the performance of ministerial duties, is amenable to the law for his conduct, and is liable to any party specially injured by his act of **misfeasance** or **nonfeasance**. When the law assigned to a judicial officer the performance of ministerial acts, he is as responsible for the manner in which he performs them, or for neglecting or refusing to perform them, as if no judicial functions were intrusted to him. The boundary of his judicial character is the line that marks and defines his exemption from civil liability."—**Grider v. Tally**, 77 Ala. 422. There are certain exceptions to the rule which are not pertinent to the question presented in your letter.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. William O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Importation of intoxicating liquors from without the State to military reservation situated therein.—

Inasmuch as importation of intoxicating liquors into Alabama is in violation of its laws, consignment of such intoxicating liquors originating without the boundaries of the State shipped to a consignee at Maxwell Field military reservation, is subject to the provisions of Alabama law, notwithstanding it is in interstate commerce. (Sections 19(3) and 24(9) Alabama Beverage Control Act; XXI Amendment of the Constitution of the United States).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I am today in receipt of a letter, dated 15 May 1937, from Brigadier General H. C. Pratt, U. S. Army Commandant of the Air Corps Tactical School, Maxwell Field, Alabama, quoted hereunder:

" 'In the course of our conferences with reference to interpretation of the Alabama Beverage Control Act as it affects the military reservation of Maxwell Field, there was a difference of opinion as to whether or not the State of Alabama, under this act, had authority to regulate the importation to and possession at Maxwell Field of beverages obtained outside the State of Alabama which come within the purview of said act.

" I am enclosing herewith a memorandum upon this subject prepared for me by the Judge Advocate of the Fourth Corps Area at Atlanta, Georgia. It will be noted that the Judge Advocate reaches a conclusion that in his opinion liquor may be legally imported onto the

reservation of Maxwell Field from outside the State of Alabama without being subject in any way to the provisions of the Alabama Beverage Control Act.

"I would appreciate very much from you a statement as to whether or not the above interpretation is concurred in."

"I am forwarding to you, attached hereto, a copy of the memorandum prepared by the Judge Advocate of the Fourth Corps at Atlanta.

"In conference with General Pratt, I expressed the opinion that alcoholic beverages might be imported from without the State of Alabama onto the reservation of Maxwell Field without the Alabama Alcoholic Beverage Control Board identification marks. At the same time, it is my understanding that the spirit of army regulations, if not the letter, requires observance of the laws of the State in which the reservation is located. If this be true, liquor not bearing the identification marks of the Alabama Alcoholic Beverage Control Board would be illegal in territory surrounding Maxwell Field.

"So that I might answer General Pratt's letter, I shall have to ask:

"**Question 1.** May the Alabama Alcoholic Beverage Control Board regulate, or control in any way, shipments of alcoholic beverages not bearing the Board's identification marks onto Maxwell Field?"

In my opinion, your inquiry must be answered in the affirmative.

I have read with interest the memorandum opinion of the Fourth Corps Area Judge Advocate wherein that official arrives at a conclusion opposite to that herein announced. One theory of his opinion is that shipment of alcoholic beverages from outside of the State of Alabama to Maxwell Field, the military reservation at Montgomery, is interstate commerce, and that therefore the State has no power of control or regulation over such shipment. His reasoning overlooks Section 2 of the XXI Amendment to the Constitution of the United States. It provides:

"The transportation or importation into any State, Territory, or possession of the United States, for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In speaking to the question of the effect of this amendment upon the power of the states over the importation of intoxicating liquors from without their borders, the Supreme Court of the United States in the recently decided case of the **State Board of Equalization v. Young's Market Company et al**, 81 L. Ed. 7, said:

"The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this board command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

"Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? Compare Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Vance v. W. A. Vandercook Co. 170 U. S. 438, 447, 42 L. ed. 1100, 1104, 18 S. Ct. 674. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? Moreover, in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic. Compare Phillips v. Moble, 208 U. S. 472, 479, 52 L. ed. 578, 581."

This decision is conclusive upon the question.

The conclusion of the memorandum opinion of the Judge Advocate is incidentally grounded upon the fact that the territory comprising Maxwell Field has been ceded to the United States and therefore that sovereignty has exclusive "jurisdiction" to the extent that regulation of intoxicating liquors transported or imported therein cannot be exercised by the State.

Without laboring that question, it is sufficient to say that the XXI Amendment to the Constitution of the United States forbids any importation or transportation of intoxicating liquors into Alabama in violation of its laws. Being a part of the cardinal law of the land, the amendment is as effective upon military reservations belonging to the United States as it is in any other place.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Howell Turner,
Secretary of State,
Capitol.

Code Section 7209—Designated agent of foreign corporation must reside at known place of business of said corporation.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which your request my opinion as follows:

"Mr. F. Pride Jones is statutory agent in this State for James B. Clow & Sons, an Illinois corporation, and National Cast Iron Pipe Company, a Delaware corporation, which certificates are on file in the office of Secretary of State. The principal offices of the above corpo-

rations are within the corporate limits of the town of Tarrant. At the time Mr. Jones was designated statutory agent for these two corporations his residence was within the corporate limits of Tarrant. Mr. Jones now desires to change his residence from Tarrant but to a place in or near the city of Birmingham. Please advise if he can continue as statutory agent for the above named corporations should his residence be outside of the corporate limits of Tarrant.

"Your attention is called to the case of *McLeod v. American Freehold Land Mortgage Company of London*, Alabama Reports 100. An early opinion will be appreciated."

In my opinion the person named cannot continue as statutory agent for the above named corporations unless he maintains his residence at the known place of business of the corporation. Code Section 7209 expressly requires that a foreign corporation seeking to do business in the State designate at least one known place of business and an agent or agents **residing thereat**. This Section was construed in the case of *McLeod v. American Freeholder Land Co.*, 100 Ala. page 496. The Supreme Court, referring to the words "agent or agents residing thereat", said:

"The terms plainly mean 'one known place of business', such as a town or city or other known place, **in which or at which the agent resides** and where he may be found."

Since the agent no longer resides at the known place of business and may not be found there, in my opinion, it is necessary for the corporation in question to file a new instrument of writing to substitute another agent as provided in said Section 7209.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Bart B. Chamberlain,
State Solicitor,
Mobile County,
Mobile, Alabama.

Statutes—Effect of Codification—

Section 33 of Acts of 1911 on pages 267-68 repealed by omission of the provisions thereof from the Code of 1923.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I wish to call your attention to Section 33 of an Act of the Legislature of 1911, found on page 267 and 268 of the General Acts of the Legislature of 1911. This section, among other things, prohibits the sale to anyone on Sunday of spirituous, vinous or malt liquors. It also makes it unlawful to employ or permit to be employed any minor or woman in selling or serving spirituous, vinous or malt liquors, or

for the owner, proprietor or manager of any premises in and upon which such liquors are retailed to knowingly permit any gaming on said premises. This is a portion of the act known as the Smith Regulation Bill which was passed by the Legislature of 1911 after the adoption of the Parks Bill of the Legislature of 1911, the Parks Bill being approved February 21, 1911.

"In 1915 the Legislature adopted an act to promote temperance and to suppress the evils of intemperance. This act is found on pages 1-35 of the General Acts of the Legislature of 1915. On page 35, section 38, I find a repealing clause. It provides "all laws and parts of laws, general, local and special, in conflict with the provisions of this act be, and the same are, hereby repealed, * * *." This act has for its purpose the repealing of the Parks and Smith Bills passed by the Legislature of 1911 and 1915 and referred to hereinabove. This act of 1915 makes it unlawful to sell, offer for sale, or keep for sale, etc. spirituous, vinous or malt liquor. The section of the act known as the Smith Bill of 1911 hereinabove referred to prohibits the sale of spirituous, vinous, or malt liquor on Sunday and the Act of 1915, as I have just stated, prohibits the sale at any time.

"The Alabama Beverage Control Act is silent on the question of selling on Sunday as I recall it, except it requires the liquor stores to be closed from nine o'clock on Saturday night to nine o'clock on Monday morning. This act only repeals the prohibition law in such instances as they are in conflict.

"I would like for you to advise me whether or not, in your opinion, the section of the act of 1911 (Smith Bill) to which reference is made hereinabove, which section prohibits the sale of spirituous, vinous or malt liquor on Sunday and prohibits any woman from selling or serving spirituous, vinous or malt liquor is repealed by Section 33 of the prohibition act of 1915, which section is found on page 35 of the General Acts of 1915."

Without limiting the answer to a consideration of whether Section 38 of the Act of 1915, on page 35, repealed Section 33 of the Act of 1911 on page 267-68, you are advised that the omission of the provisions of the latter section from the Code of 1923 had the effect, in any event, of repealing same. See Code of 1923, Section 11, State v. Towery, 143 Ala. 48, 39 So. 309.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Where there is a confession of judgment in a criminal case under Section 5288, Code of Alabama, 1923, the cost of the prosecution is the first item to be paid. After this is paid then whatever amount is collected goes to discharge the fine.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 5, 1936, in which you request my opinion as follows:

"Opinion of the Attorney General is hereby requested on the following matter:

"For example, John Doe is fined \$100.00 and cost, the cost amounting to \$40.00 and same is secured and payments made from time to time and the defendant dies or Fi Fa returned by Sheriff vs. Defendant and securities "No Property Found" leaving a balance due of \$60.00 would I be in the clear and entitled to distribute to all due cost the total amount of cost due each and then apply the \$40.00 on the fine and not prorate the \$80.00 to every item including fine? Would not the same rule apply to fine and cost in criminal cases as to judgments in civil cases, it being true in civil cases that cost is distributed first and whatever is remainder if not paid in full is applied on judgment?"

Where there is a conviction for a misdemeanor and the defendant is released under Section 5288, Code of Alabama, 1923, on confession of judgment then the process of collecting the fine and costs becomes a civil matter from there on out and the same is treated as such.

I call your attention to an opinion of this office written June 9, 1936, to Hon. Chas W. Lee, State Comptroller, Quarterly Report, Attorney General, Vol. 3, page 150. It is my opinion the cost is the first item to be paid and when this has been done, then whatever balance is left over goes to the payment of the fine as stated above. The collection of the fine and cost after confession is a civil process. I call your attention to an opinion of this office written June 26, 1936, to Hon. William D. Peeler, Clerk of the Circuit Court of Equity, Lauderdale County, Quarterly Report of the Attorney General, Vol. 3, page 217.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Bart B. Chamberlain,
Solicitor, Mobile County,
Mobile, Alabama.

Officers—one acting as Second Assistant Solicitor of Mobile County and performing the duties thereof during a short period before receiving formal appointment entitled to compensation for that period.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 8, 1937, which is as follows:

"On February 24th, 1937, my friend and law partner, Jack Courtney, died. He was, at that time, Assistant Solicitor for this Circuit, having been appointed as such by me. The compensation provided for

that office was \$3600.00 per annum payable in twelve monthly installments. Subsequent to Mr. Courtney's death a check was received from the County of Mobile in the sum of \$258.63 in payment of the February installment this amount being computed on a basis of the number of days which Mr. Courtney was actually employed.

"On March 1st, 1937, I formally appointed my son to fill the vacancy thus occurring. Between the date on which Mr. Courtney died and the first of March my son filled Mr. Courtney's place by trying the criminal cases on the State docket in both the Inferior Criminal Court of Mobile County and also in the Recorders Court of the City of Mobile and by performing any other service required of the second assistant. There was absolutely no lapse in the performance of the duties of the second solicitor between the death of Mr. Courtney and March 1st.

"As you know, the act providing for the appointment by me of an Assistant Solicitor vests in me the power to appoint solely and does not require any approval of such appointments by the Governor or any commission to such appointee from the Governor. I have stated the foregoing to you in order that you will be thoroughly familiar with the situation.

"It has occurred to the Second Assistant Solicitor that since he was acting as such from February 24th to March 1st, in an ex-officio capacity under my direction and under my order that he is entitled to the difference between the amount paid to Mr. Courtney's estate, that is \$258.63 and the total amount of the monthly installment for February, which difference amounts to \$41.37. This matter has been presented to Mr. Stone, the County Treasurer, and he suggested that I write you for an opinion on this matter.

"I will appreciate your opinion as to the validity of the Second Assistant's claim for the above sum against the County of Mobile."

In answer to your inquiry, I am of the opinion that the Second Assistant Solicitor is entitled to compensation from the time he assumed the office and performed the duties thereof although he did not receive his formal appointment until later. In other words, he would be entitled to \$41.37, as stated in your letter.

During the time the party in question assumed the office of Second Assistant Solicitor and performed the duties thereof and before he received his formal appointment, he may well be considered a de facto officer. A de facto officer is defined in 46 Corpus Juris, 1053, as follows:

"An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer for such a length of time, and under such circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, and induce people, without injury, and replying on the supposition that he is the officer he assumes to be, to submit to or invoke his action; and in some, although not all, jurisdictions, only when the office has a de jure existence."

A de facto officer, holding office as such, is entitled to the emoluments of said office while so acting.—**Biennial Report Attorney General, 1930-**

1932, pp. 114 and 954; *Waldrop, Clerk, v. Courson*, 206 Ala. 189; *Reynolds v. McWilliams*, 49 Ala. 552.

The premises considered, it is my opinion that the Second Assistant Solicitor in question, is entitled to the compensation from the time he assumed said office and performed the duties thereof to the time he received his official appointment. Of course, after he received his official appointment there is no question that he would be entitled to the emoluments of said office.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. C. H. Keller,
Register, Circuit Court,
Cullman County,
Cullman, Alabama.

Costs in equity suit in discretion of Circuit Judge, and Register has no authority to issue execution for costs against unsuccessful party until costs are taxed.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of February 27, 1937, in which you request my opinion as follows:

"I will thank you to let me have an opinion on the following question: Rule 4 of the Rules and Practices of Courts, Volume 4, page 898 of the 1923 Code of Alabama reads as follows:

" 'EXECUTIONS WHEN ISSUED—On every final judgment rendered during the term (unless the party to be benefited thereby, or his attorney, shall, in writing, otherwise direct) the clerk shall issue execution as soon after adjournment as the law will permit.' "

"In a divorce case filed in the Chancery Court, where the complainant filed a bill for divorce and the defendant to the bill filed a cross bill and obtained relief on her cross bill and in the decree granting the cross complainant a divorce, the original bill filed in the cause was dismissed, and the Court referring the matter of alimony to the Register on reference to determine the amount of alimony due the cross complainant and where the Court renders another decree confirming the report of the Register and decreeing that the cross complainant be allowed the sum of \$10.00 per month as temporary and permanent alimony and that he pay to her as a reasonable Solicitor's fee the sum of \$50.00 and the decree further reading as follows:

" 'It is further ordered, Adjudged and Decreed by the Court that for the collection of said allowance to cross complainant and also for Solicitor's fees the cross complainant may have execution issued against the complainant and on his failure to pay said allowance or any installment

thereof, the cross complainant may appeal to the Court for proper orders or process to enforce the payment herein provided for,'

"in a case of this nature where the cost is not specifically taxed by the Court and where the original complainant had property subject to execution would the register be authorized under the section heretofore mentioned and by the language of the clause of the decree which reads:

"That for the collection of said allowance to cross complainant and also for Solicitor's fees the cross complainant may have execution issued against the complainant,'

"be authorized to also include in the execution in addition to the amount of alimony due at the time the execution is issued and the Solicitor's fee, also the costs of the suit, that is, the Trial Tax, the Register's fees, etc., or would it be necessary that a petition be filed asking that the Court specifically tax the cost before an execution could be issued for the costs. I am assuming that the Register would have the authority to issue execution since a final decree was entered in the case determining the equities between the parties and that since the equities are settled, a final decree has been rendered in the case and since the complainant was unsuccessful in his suit that the cost would fall upon him and that since he had property subject to execution that his property would be liable for the cost."

In my opinion you have no authority to include in the execution the amount of costs, until the same are taxed, but should request the Court to tax the costs specifically.

The rule of court referred to by you is applicable only to Circuit Courts at law. By the express provisions of Code Section 7221, the successful party is entitled to full costs in civil suits at law. In chancery proceedings, however, costs may be apportioned at the discretion of the Circuit Judge: Code Section 6655. "In equity the question of costs rests largely in the discretion of the Chancellor." *Manning v. Carter*, 201 Ala. 218, 77 So. 744; *First National Bank of Mobile v. Watters*, 201 Ala. 670, 79 So. 242.

In my opinion, until the Circuit Judge taxes the costs in such a proceeding in equity, you have no right to assume that the court will tax the costs against the unsuccessful complainant and issue execution against him.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 15, 1937

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

License Inspector not entitled to fee for citation to new owner of automobile failing to report change of ownership within five days.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Schedule 158.14 of Revenue Acts provides for transfer of Motor Vehicle ownership and for such change in ownership to be reported to the Probate Judge within five days from date of such change.

"In case a transfer was not reported to the Probate Judge within five days as provided by law and the License Inspector should cite such person to appear before Probate Judge and make proper transfer will the License Inspector be entitled to citation fee of \$1.50 for such notice, in other words would I be required to collect this citation fee for the License Inspector."

In my opinion, your inquiry should be answered in the negative. It is well settled that an officer is not entitled to a fee unless it is expressly provided by the statute. Section 353, Subsection (a) of the General Acts of 1935 requires a License Inspector to cite the operator of the motor vehicle being operated **without a proper or legal license** and in filing copy of such citation with the Probate Judge he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof. It further provides under subsection (g) that the License Inspector is entitled to \$1.50 for each citation served, to be taxed against the delinquent. In construing this statute, it is my opinion that the License Inspector is entitled to a fee for serving such citation only where motor vehicle is being operated without a proper or legal license.

Schedule 158.14 of the Revenue Act provides as follows:

"(a) When proper motor vehicle license tags shall have been bought for the current tax year for a motor vehicle and such motor vehicle shall have been sold or transferred to a new owner or to new owners, either once or successively, such motor vehicle license tags shall remain on such motor vehicle in the hands of the new owner or successive owners for the balance of the tax year, **and no new or other license tags need be taken out** for the operation of such motor vehicle until the beginning of the next tax year. Provided, each and every change of ownership of such automobile, or other motor vehicle, and the name and address of the new or successive owner are noted by the Probate Judge on his record of the license and reported by him within ten days after such change in ownership is reported to him to the State Tax Commission and it shall be the duty of the old and new and successive owners to report such change in ownership to the Probate Judge within five days from such change in ownership."

Under the first part of said Schedule, it is provided that when proper motor vehicle license tag shall have been bought for the tax year, no other license tags need be taken out for such vehicle until the next tax year. This portion of the Schedule is absolute and is not conditioned on proper report of change in ownership being made to the Probate Court. Although it is made the duty of both the old and new owners to report such change in ownership, no penalty for failing to do so is specified by the Act other than by Subsection (d), subjecting such owner to fine or imprisonment. It is therefore my opinion that under the express provision of Schedule 158.14, a motor vehicle being operated with a proper motor vehicle license tag bought for the current tax year may be operated without a new or other license tag, even after the transfer of ownership and after five days after transfer of ownership without report of such change of ownership

and therefore the License Inspector has no legal authority to cite the operator of such vehicle for operating a vehicle without proper or legal license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Driver's License Renewal—Applicant has from October 1 to November 15 of each year in which to procure such license.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Will you please give me an opinion on Section 1 of an Act of the Legislature of 1935 known as the Driver's License Act, Acts 1935, page 756. I want an opinion on this particular point: Is a person who procured a license for the year October 1, 1936, through September 30, 1937, entitled to secure a new license for the year beginning October 1, 1937, at any time between October 1st and November 15th?"

In answering your request, I call your attention to Section 1 of an Act approved September 2, 1935, General Acts 1935, page 756, known as the Driver's License Act.

"Section 1. That every person, except those hereinbelow exempted before operating or driving any motor vehicle upon a public highway in this State, shall procure a driver's license. **The first license shall be obtained between October 1, 1935, and November 15, 1935, and shall expire September 30, 1936, and a like license or renewal thereof shall be obtained annually thereafter.**" (Emphasis supplied)

You will note the underlined portions of the above section provide that the first license was to be obtained between October 1, 1935, and November 15, 1935, and that the renewal thereof should be obtained "annually thereafter." In my opinion, the word "annually" carries the import that the same period of time be given for obtaining a license in the subsequent years as in the first. The Pertinent sentence says that "The first license shall be obtained **between October 1, 1935, and November 15, 1935.**" Then follows the statement that "a like license or renewal thereof shall be obtained **annually thereafter.**" Thus it would appear that a license might as well be obtained on October 6, 1936, as on October 1, 1936, and still be obtained "**annually thereafter**" with relation to the date "**between October 1, 1935, and November 15, 1935.**"

I therefore advise you that a renewal of the driver's license provided for by the 1935 Act, *supra*, may be obtained at any time between October 1 and November 15 of each year.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. J. A. Keller,
Superintendent of Education,
Montgomery, Alabama.

Schools—Physical education—

Obligations incurred by County Board of Education for athletic equipment to further system of physical education in public schools may be paid from general school fund.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I will thank you to advise me whether it is legal for a county board of education to use the general school funds of the county in liquidating certain claims outstanding against the county board of education for athletic equipment purchased during the year 1931-32. This inquiry is based on a request made of this Department by Mr. S. M. Tharp, County Superintendent of Education of Baldwin County, Alabama. He states that prior to October 1, 1932, matriculation fees were collected and placed in the general fund of the county and that all bills were paid from the general fund and district tax fund. However, in view of the closing of the Baldwin County Bank, which was the depository of county school funds, the amount available for expenditures of the kind named above, was impounded. The Baldwin County Bank has now been liquidated and certain moneys have become available, which if legal could be used for the payment of the equipment."

In my opinion your inquiry must be answered in the affirmative.

Section 621 of the School Code of 1927 provides:

"621. PHYSICAL EDUCATION REQUIRED—Every public school and private or parochial school shall carry out a system of physical education, the character of which shall conform to the program or course outlined by the State Department of Education."

Section 20 of the said School Code provides:

"20. PHYSICAL AND HEALTH EDUCATION, DIVISION OF—The Division of Physical and Health Education, subject to the approval of the State Superintendent of Education, shall outline a course of physical training for the various schools of the State. It shall collect and disseminate useful data on the health of school children, and shall devise ways and means of co-ordinating the work of health education of the Department of Education, and of the county and city boards of

education, with the work of the State Board of Health and with the health authorities in counties and cities."

This latter section has been repealed by Acts of 1935, page 598, but was in full force and effect in the years 1931 and 1932. Its repeal in 1935 did not change the policy of the State relative to physical education. I know of no reason why the obligations incurred for athletic equipment procured to further a program of physical education, as required by law, may not be paid from the funds referred to in your letter of inquiry. Cf. Quarterly Report of the Attorney General, Vol. V., page 5.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. J. A. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Counties—No authority to appropriate any part of its share of Sales Tax or proceeds of Alabama Beverage Control Act to Alabama Citizens' Committee.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of May 19, 1937, in which you request my opinion as follows:

"I am writing to inquire, Under the Constitution and the laws, would it be within the letter and the spirit of the law for the Autauga County Board of Revenue to make an appropriation from the revenue allocated to Autauga County from the Sales Tax and the Liquor Tax for the purposes of Public Health, Public Welfare and Agricultural Extension to THE ALABAMA CITIZENS' COMMITTEE TO SERVE IN THE INTEREST OF THE STATE HOSPITALS AND THE PUBLIC HEALTH, H. O. Murfee, Secretary?

"This Alabama Citizens' Committee has received the official endorsement of Dr. J. N. Baker, State Health Officer, and of Dr. W. D. Partlow, Superintendent of the Alabama Hospitals. The work of this Alabama Citizens' Committee is designed to serve the cause of public health, public welfare, and mental hygiene through the State Hospitals and an Office of Administration for information and education situated in Prattville,

"Organized in September, 1936, the work of this Committee has already resulted in the passage of two Acts of appropriation by the recent Special Session of the Legislature totaling \$500,000 to provide urgently needed buildings and equipment at The Bryce Hospital, the Searcy Hospital, and the Partlow State School for Mentally Deficient Children. The Committee is now working to secure a Federal grant of \$400,000 to supplement the State appropriation of \$500,000. Also, the Committee will undertake to secure \$250,000 to build, equip, and endow an

Alabama Psychiatric Hospital and Mental Hygiene Clinic as a part of the State Hospitals and affiliated with the Medical School of the University of Alabama.

"The Headquarters Office of the Alabama Citizens' Committee is being established in Autauga County at Prattville for service to all the Counties of Alabama as well as to the State Hospitals.

"For this purpose, The Alabama Citizens' Committee has made application to The Autauga County Board of Revenue for an appropriation to aid this work of Public Health and Public Welfare through service to the State Hospitals and the cause of Mental Hygiene—serving all the Counties of Alabama.

"As Autauga County now has no Health Unit, the Board of Revenue is considering making an appropriation to The Alabama Citizens' Committee as a public service to health and the general welfare through the work of The Alabama Citizens' Committee to Serve in the Interest of the Public Health and the State Hospitals—a work which will serve every county in Alabama as well as Autauga County.

"However, the Autauga County Board of Revenue desires to secure your legal opinion before making such an appropriation. Would such an appropriation be within the letter and the spirit of the law?

"The expense of the work of The Alabama Citizens' Committee To Serve in the Interest of the State Hospitals and the Public Health has been paid by donations from Members of this Committee and personal friends for the first six months of the work. Thereafter, by personal contributions from six Probate Judges and from three County Boards of Revenue.

"As the work of this Committee is essentially a public service of humanity and pure patriotism, in the interest of the public health and the public welfare, this Committee hopes that the law permits the public revenue allocated to Autauga County to be appropriated by the Board of Revenue for this purpose—in part, and for the period of one year, such an allocation of the revenue in part which is allocated to Autauga County from the Sales Tax and the Liquor Tax.

"In this, we believe, the State of Alabama and every County, as well as Autauga County and the Hospitals, will be served in the highest degree."

It is my understanding from the facts set out in your letter that the Alabama Citizens' Committee is not incorporated, but is a voluntary organization of public spirited citizens residing in various counties of the State. The purposes of the organization are not set out, but it appears that the main purpose of the committee is to secure the passage of various laws applicable to the State as a whole.

While it appears that the Alabama Citizens' Committee is working for a good purpose, I find no authority which would authorize the Board of Revenue to appropriate to such Alabama Citizens' Committee a portion of the revenue allocated to Autauga County from the Sales Tax and the Liquor Tax.

Section 21 of the Sales Tax Act provides:

"* * * provided that the funds divided and distributed to the several counties of the State as hereinabove provided for shall be used ex-

clusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioner's Court, Boards of Revenue or other governing bodies of the several counties of the State."

Section 9 (c) of the Alabama Beverage Control Act provides:

"*** ten per cent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties, and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions, and for the other purposes of the County Departments of Public Welfare; ***"

In addition to the amounts paid over to the county under this section Section 12, provides:

"All license fees collected under this Section shall be collected by the Board for the use of the county in which such licenses were levied and in which the applicant's place of business is located, and shall be paid over to said county at quarterly intervals."

Section 22 (7) provides in part as follows:

"License fees paid for retail dispenser licenses shall be paid by the Board to the counties in which the licensed places are located, and in which such licenses are levied."

Under these provisions all of the money paid to the county from the sales tax and a portion of the money from the administration of the Alabama Beverage Control Act, are required to be used "**exclusively**" for certain purposes of health and public welfare. The balance of funds payable to the counties under the Alabama Beverage Control Act are not ear-marked for any special purpose.

While the Board of Revenue has a large amount of discretion as to certain matters, I find no power in such Board of Revenue to make an appropriation to such an unincorporated organization as the ALABAMA CITIZENS' COMMITTEE. The power of the Board of Revenue to make rules and regulations for the support of the poor is governed by Code Section 6755 (6). The power to make appropriations for paupers is limited by sub-section 13 of that Section. Sub-section 20 of said Section 6755 provides that the Court of County Commissioners or similar body has authority "to appropriate money to promote or enforce the health and quarantine laws of the State for the benefit of the county and its inhabitants, when requested to do so by the State Board of Health".

The provisions of Code Section 1050 also militate against the appropriation requested. That section provides:

"Section 1050. No local board of health, or other executive body for the exercise of public health functions other than the County Board of Health, shall be established or exist in any county or municipality. Nor shall any board, body, or organization engage in any public health work, except under the supervision and control of the State Board of Health.

Code Section 1055, sub-section (12), as amended by the Acts of 1935, reads as follows:

"The Court of County Commissioners may in its discretion appropriate from the revenues of the county, money for the prosecution of public health work, which has been recommended by the county health officer and endorsed by the County Board of Health and approved by the said Court of County Commissioners."

Construing these various statutes, the legislative intent is clear that there shall be no board for the exercise of public health functions in the county other than the County Board of Health. Appropriations by the County for health purposes are limited in both Code Sections 6755 (20) and Section 1055 (12). In addition to these statutes I call your attention to Sections 73 and 94 of the Constitution which read as follows:

"73. No appropriation shall be made to any charitable institution not under the absolute control of the State."

"94. The Legislature shall not have power to authorize any county to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation."

These provisions lead me to conclude that the Board of Revenue of Autauga County has no authority to appropriate funds to the ALABAMA CITIZENS' COMMITTEE in the interest of the State Hospitals and the public health.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

June 15, 1937

Hon. I. G. Hendon, Superintendent,
Randolph County Schools,
Randolph County,
Wedowee, Alabama.

Death of Treasurer of School Funds does not affect validity of checks signed by such officer.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of May 4, 1937, in which you request my opinion as follows:

"H. W. Boone, Custodian of Randolph County School Funds, died on May 3, 1937.

"I wish to inquire if a check signed by H. W. Boone, Treasurer of School Funds of Randolph County, on April 1, 1937 or any previous payroll can now be cashed?

"If the outstanding checks cannot be paid, please advise what procedure is required in clearing said checks."

In my opinion, any checks signed by H. W. Boone, Treasurer of School Funds of Randolph County, can be cashed in spite of his death. It is the general rule that the death of the drawer of a check operates as a re-

vocation of the authority for the bank to pay. 7 C. J. 103. The theory of cases so holding is that the drawer has a right to countermand payment by the bank and his death automatically countermands his order to pay. The other theory given in support of this holding is that immediately upon the death of the drawer the deposit in the bank becomes a part of his estate and subject to order of his administrator or executor alone.

Such reasons are, of course, inapplicable where the deceased drawer signed the check not on his individual funds but in his official capacity. The office of Treasurer of School Funds of Randolph County has not died, and the order lawfully given by it to the bank is still a valid order to pay the named payee, or his order.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

June 15, 1937

Hon. F. B. Carpenter,
Clerk & Register Circuit Court,
Clay County,
Ashland, Alabama.

The Judge of the Circuit Court when sitting in equity is given the power to adjudge and tax the cost as he may deem equitable and right under the facts involved in the proceedings and, when so judicially determined, the costs must be collected according to the judgment of the court taxing the same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 14, 1936, in which you request my opinion as follows:

"In an Equity case where the Respondent answers and files a cross bill making himself respondent-cross complainant and making the complainant the complainant cross respondent, which case is judicially determined taxing the cost of said suit one half against the complainant and one half against the respondent; execution is issued against each for one-half of the cost accrued and the execution against the complainant-cross respondent is returned marked "No Property Found;" execution against the respondent-cross complainant is returned satisfied.

"Would it then be proper to issue another execution against the respondent-cross complainant for the balance of the cost or should execution then be issued against him for the balance of the cost not paid by him on the first execution that **accrued at his instance.**"

It is my opinion in the case as stated above by you the costs must be collected as decreed by the Judge, that is, the complainant must pay one-half the cost and respondent pay one-half. From the facts as I gather them from your statement the bill of costs was judicially fixed by the court. This being true, it is my opinion it is taken out of the operation of Sections 7263 and 7806, Code of Alabama of 1923. Now, if the costs had

been taxed by operation of law, that is, against the unsuccessful party, I think the rule would be different, but when the Judge of the Circuit Court is sitting in equity he is given the power to tax costs as may seem just and proper and when he exercises this function and splits up the cost as in this case I do not believe the sections, *supra*, can intervene. I am unable to find where our courts of last resort have passed on this question but the construction, as above set out, is the only construction that can be placed on the matter in view of the facts as stated in your request.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

June 15, 1937

Hon. Homer F. Mitchell,
Probate Judge,
Cullman County,
Cullman, Alabama.

Revenue Act, 1935—Sales of real estate for taxes.

1. Notice required by Section 217 (a) is sufficient if served on personal representative, in the event person making assessment dies prior to date of proceedings for tax sale.

2. When assessment is made by personal representative, notice required by Section 217 (a) must be served on him, or his successor, and publication or posting provided by Section 218 must be effected.

3. An assessment of real estate to the "estate" of a decedent will not support a tax sale.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. When a person dies after making an assessment and an administrator or executor is appointed on his estate is it sufficient to serve the notice required by section 217 of the Revenue Act of 1935 on the administrator or executor, or must the notice also be given by publication as provided for non-residents?

"2. When an assessment is made by an administrator or executor for the estate of a deceased person, is it sufficient to serve the notice on the administrator or executor making the assessment without any publication?

"3. When an assessment is made for the estate of a deceased person where no administrator or executor has ever been appointed, is it sufficient to serve the notice required by this section on the party making the assessment, whoever he may be, without any publication?

"These questions are all based on the assumption that all parties are residents of the county."

Answering your first inquiry, it is my opinion that in the event a taxpayer assesses his property for taxation and thereafter dies before the taxes are paid and a personal representative is appointed to administer his estate, it is a sufficient compliance with the laws relative to the sale of land for the payment of taxes if the Tax Collector serves a notice required by Section 217 (a) of the Revenue Act of 1935 on the personal representative of the decedent.

Section 217 (b) of the Revenue Act of 1935 provides, in part:

"If the party against whom such assessment was made has since died, and letters testamentary or of administration have been granted upon his estate, such notice must, in like manner be served on his personal representatives, if a resident of the county."

Your second inquiry must be answered in the negative.

Section 217 (b), supra further provides:

"If the property or other subjects embraced in any assessment were returned or listed by a guardian, or other person, for a minor or person of unsound mind or by trustee for his cestui que trust, except husband or wife, or by personal representative for the estate of any deceased person, or by a public officer, receiver, or appointee of any court, such notice must in like manner be served on the party making the return, or his successor, and also by publication or posting, as provided in the next succeeding subsection."

Your third inquiry must be answered in the negative. In the event taxes are assessed to the "estate" of a decedent, for whom no personal representative has been appointed, it is not such assessment as will support a sale for delinquent taxes. *Scott v. Brown*. 106 Ala. 604, and cases there cited. Cf. Quarterly Report of the Attorney General, Vol. III, pages 202, 203.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

June 15, 1937

Honorable J. A. Keller, Superintendent
State Department of Education
Montgomery, Alabama

1. Expenditures made from Minimum Program Fund are limited to the purposes set forth in the Minimum Program Fund Act. (Acts of 1935, p. 714.)

2. Travel expenses of board member under facts set forth held not to be within purposes of the act. Payment of expenses of teachers to attend Peabody College under facts set forth held not to be within the terms of the Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your request which is as follows:

"The question of the extent of the discretion of the county board of education over the authorization of various items of educational expenditures has frequently been raised. For instance, county boards of education often find that they need to spend money in the interest of the schools for certain items not specifically authorized in the law. Auditors frequently charge these items back against the county superintendent as valid expenditures.

"Two illustrations of this type of expenditure are as follows:

"Mr. Raymond E. Thomason, a member of the Jefferson County Board of Education, was authorized by the Board of Education to make certain trips to Washington, to various points in Jefferson County, and to Montgomery for the purpose of securing federal aid for school buildings to be erected in Jefferson County. Mr. Thomason, by virtue of his connections with relief organizations, W. P. A., boards, etc., was in position to be of more service to the Board of Education in securing funds for school buildings than the County Superintendent of Education. He was also able to secure loans and grants in amounts exceeding \$1,000,000. The Board of Education paid him no salary for his services but authorized his actual expenses to be paid. These expenses have been charged against Mr. E. B. Ervin, then Superintendent of Education of Jefferson County Schools. Nevertheless, the County Board of Education felt that it acted in the best interests of the schools of Jefferson County in authorizing this expenditure.

"The Jefferson County Board of Education also used its discretion in authorizing an expenditure of funds not specifically authorized in the law as follows:

"Assistant Superintendent of Education B. W. Self is directing the work of curriculum study for the Jefferson County Schools. In the furtherance of this project, the Jefferson County Board of Education authorized Mr. Self to transport two automobile loads of teachers to the George Peabody College in Nashville on Saturdays for the purpose of receiving assistance from curriculum experts in Peabody College. The Board authorized an expenditure for transportation only for these teachers, believing that this expenditure would benefit the schools of Jefferson County.

"Numerous other illustrations of the above character could be given.

"Your opinion is desired upon the following questions:

"1. Does the State Board of Education have the authority to grant to the county board of education discretion over the expenditure of funds coming to it from the Minimum Program Fund for 'Other Current Expense'?"

"2. Does the county board of education have the authority to spend, from the Minimum Program Fund, money received for 'other current expense' as in the opinion of the county board of education of that county best serves the interests and needs of the schools?"

"3. If the answers to the above questions are in the affirmative, does the Jefferson County Board of Education have the authority to pay the expenses of Mr. Raymond E. Thomason and of the teachers who attended Peabody College in the interest of improving the curriculum of the Jefferson County Schools?"

"Your attention is respectfully called to the following facts bearing upon the questions asked:

QUESTION 1.

"a. Section 2 of Act No. 295, approved September 2, 1935, gives the State Board of Education authority to set up regulations for the apportionment of the Minimum Program Fund. Subsection 'c' of Section 2 (page 717 of the 1935 General Acts) authorizes the State Board of Education to apportion part of the Minimum Program Fund for current expenses other than teachers' salaries and transportation.

"b. Section 3 of Act No. 326, approved September 2, 1935, authorized the State Board of Education to set up regulations regarding the expenditure of the Minimum Program Fund.

"c. After the enactment of the two laws referred to above, the State Board of Education set up regulations relating to the apportionment and expenditure of the Minimum Program Fund. On page 7 of these regulations, which are appended to this letter, the method of calculation of the allotment to the counties for 'Other Current Expense' is given. The following is quoted from the Minutes of the State Board of Education relating to the expenditure of funds allotted to the county for 'Other Current Expense': 'This allotment in the Minimum Program for other current expenses shall be used by the board of education of any county or city for such purpose or purposes as in the opinion of the board of education of that county or city best serves the interests and needs of the schools.'

QUESTION 2.

"a. Section 86 of the Alabama School Code of 1927 reads in part as follows: 'The general administration and supervision of the public schools of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education.'

"b. Section 3 of Act No. 326, approved September 2, 1935, provides for the consolidation of the Bonus School Fund with the Minimum Program Fund. Section 294 of the Alabama School Code of 1927 provides that the Bonus School Fund shall be spent 'as in the opinion of the said county board will best promote the cause of education in said county.'

"c. Since the Bonus School Fund has been consolidated with the Minimum Program Fund and a portion of the Minimum Program Fund set aside for 'Other Current Expense,' I believe that the county board has the same discretion over the expenditure of funds allotted in the Minimum Program Fund for 'Other Current Expense' as it previously had over the expenditure of the Bonus School Fund.

"It is not argued that the county board of education has the authority to spend funds for 'Other Current Expense' capriciously but rather that as long as these funds are spent for the benefit of the schools, the county board has the authority to decide whether the expenditure being made is justifiable. The statutes definitely limit the purposes to which certain funds being administered by the county board of education can be applied. However, there are placed in the hands of the board certain other funds over which the only limitation is that the funds be expended for public school purposes. If the county board of education upon the recommendation of the county of the county

superintendent of education does not have the authority to spend this money for the benefit of the schools in its discretion, I know of little use for the existence of the county board of education as far as school financing is concerned.

QUESTION 3.

"Undoubtedly, The Jefferson County schools received the benefit from the expenditures so made by the county board of education. Furthermore, in an opinion rendered by you to Mrs. Bessie R. England, Custodian of Perry County School Funds, on March 20, 1937, and in another opinion rendered to Mr. J. G. Pinson, County Superintendent of Education of Coosa County, on October 28, 1936, you upheld the theory that since the Bonus Fund is now a part of the minimum Program Fund that the county board of education can pay from the Minimum Program Fund for items which, although not specifically authorized in the law, would be for the benefit of the schools.

"It would involve endless detail to set out in the statutes every item for which a board of education could validly expend school money. It appears that the Legislature intended for the county board of education to exercise wide discretion over the expenditure of certain school funds 'as in the opinion of said county board will best promote the cause of education in said county.' This quotation 'is taken from Section 294 of the 1927 School Code. In relation to this point, your attention is again respectfully called to Subsection 'c' of Section 2 of Act No. 295 (page 717 of the 1935 General Acts), which sets up a portion of the Minimum Program Fund to be spent for current expenses other than teachers' salaries and transportation."

In answer to your first and second inquiries, I am of the opinion that the State Board of Education can grant no authority to the County School Board for any expenditures from the Minimum Program Fund except for the purposes specified in the act creating that fund. (Act approved Sept. 2, 1935, Acts of 1935, p. 714). The authority of the County Board of Education in spending these funds is subject to the same limitation.

The Minimum Program Fund Act, *supra*, provides in Section 1, that the Minimum Program Fund "shall be used for providing a minimum school term and for the equalization of educational opportunity." The bonus fund which heretofore existed, is by Act of the Legislature now made a part of the Minimum Program Fund (Section 3, of an Act approved September 2, 1935, 1935 Acts, p. 751).

I am of the opinion that the bonus school fund has been merged into the Minimum Program Fund and that the bonus fund is now limited to the purposes set forth in the Minimum Program Fund Act. This construction was followed in an opinion to Mrs. Bessie R. England, as Custodian of Perry County School Funds, Marion Alabama. (Vol VI, Quarterly Reports of the Attorney General, page 165.)

Our problem in reference to the two instances detailed by you is therefore to determine whether these expenditures come within the purview of the Minimum Program Fund Act. I am of the opinion that neither comes within the purview of this act and that both expenditures were therefore improperly made. While the Minimum Program Fund Act makes provision for capital outlay, and for an annual building program. I believe the payment of travel expenses of a person on trips in order that his "connections with relief organizations, WPA boards, etc.," may be utilized by the Board

of Education in securing funds for school buildings is not within the contemplation of this act.

I refer you to an opinion of this office addressed to Judge Watkin M. Vaughn, Selma, Alabama, dated July 10, 1936, for a similar holding in reference to the use of county funds to obtain railroad facilities for the county.

I believe further that the payment of the expenses of teachers on a trip to Nashville to make observations in reference to curriculum study, is not within the purview of the Minimum Program Fund Act.

I am therefore of the opinion that all expenditures from the Minimum Program Fund are limited by the provisions of the Minimum Program Fund Act, and I am of the opinion that the two expenses detailed by you do not come within the contemplation of this Act.

Yours very truly,

A. A. CARMICHAEL,

Attorney General,

June 15, 1937

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

1. Mere non-use of corporate powers does not dissolve municipal corporation.
2. Title to property of municipal corporation, when charter is forfeited, shall vest in the county in which the municipal corporation is situated.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 28, 1937, in which you request my opinion as follows:

"Please advise what disposition should be made of automobile license money collected for a town if and when that town ceased to function as an incorporation.

"We have taken the authority to pay the same into the general fund of the county. Is that correct or not?"

I understand from you that the town in question is the Town of Fulton, Alabama, having a population of less than 1100 inhabitants; that this Town has ceased to elect a mayor and councilmen and that such councilmen are not functioning but that no steps have been taken to have the charter forfeited as provided by law.

It is well settled that a municipal corporation does not ipso facto become dissolved or forfeit its charter by non-use for any period of time. **Butler et al v. Walker et al**, 98 Ala. 358, 13 So. 361, 46 C. J. 173. In the absence of either legislative action or judicial action either dissolving a municipal

corporation or forfeiting its charter, the municipal corporation remains an entity and is entitled to its property.

Under the provisions of Code Section 2330, if any municipal corporation having a population of 1100 inhabitants or less fails to elect a mayor or other chief executive for more than six months after the time fixed for such election, and for certain other causes, the municipal corporation shall forfeit its charter. Its forfeiture may be declared by a hearing before the Judge of Probate on petition of the Court of County Commissioners or any five qualified voters of the county in which the city is situated.

In my opinion, some such action is necessary before the municipal corporation becomes dissolved under the above decision.

If such proceedings are taken, it is expressly provided by Code Section 2333 that the title to the property of the municipality shall vest in the county in which such municipal corporation is situated, subject to the payment of the indebtedness of the municipal corporation. In the event such decree of forfeiture is rendered and the municipal corporation owes no debts, its property, including the funds in your hands become the property of the county and should be paid into the general fund of the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General,

June 15, 1937

Hon. H. B. Hamner,
County Superintendent of Education,
Russell County,
Seale, Alabama.

Territory taken from one county and attached to another is relieved of the indebtedness of the county to which it formerly belonged.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of May 27, 1937, in which you request my opinion as follows:

"We urgently request your opinion with reference to the following school matter:

"Several years ago, part of Lee County was annexed to Russell County, and part of Russell County annexed to Lee County. All the territory in the swap was a part of two school districts that were levying the special three mill district school tax. The Legislation providing for the exchange of territory provided that Russell County pay Lee County a cash consideration, about \$12,000.00, I believe.

"As I understand it, the special three mill district school tax in both districts had been voted for a definite purpose, namely: To help retire school building warrants.

"Lee County now has on hand with the custodian of school funds some \$350.00 or \$400.00 collected in that territory formerly a part of Russell County; the Russell County Custodian of school funds now has on hand about \$1,300.00 collected in the territory formerly a part of Lee County.

"In an audit of my records by the Comptroller's department several months ago, I was instructed not to pay to Lee County the district tax collected in the territory formerly a part of Lee County until I had an opinion from you. It is this opinion we now urgently request. I have reason to believe I shall soon receive a letter from the Comptroller instructing me to pay this \$1,300.00 to Lee County Custodian of School Funds. Should it be paid? Did the payment of \$12,000.00 by Russell County to Lee County in the swap of territory relieve Russell County of the necessity of paying this district tax to Lee County?"

The Act rearranging the boundaries of Lee and Russell Counties is found in Local Acts of 1932, Extra Session, page 16. Passed at the same time and appearing in the Local Acts of 1932, Extra Session, page 17, is an Act providing for an adjustment by reason of the property attached to Russell County being of greater value than that attached to Lee County. This latter Act provides:

"That the just and equitable share of the county indebtedness of Lee County to be paid to Lee County by Russell County on account of the changes in the boundary lines and on account of the fact that by such changes property of greater value has been placed in Russell County than the property which has been placed in Lee County be and it hereby is fixed at \$12,600.00."

Under the express terms of this statute, therefore, such sum mentioned in your letter to be paid to Lee County was for the portion of the indebtedness of Lee County which should equitably be paid by the property attached to Russell County.

The law under similar circumstances is definitely settled by the Supreme Court decision in the case of **Houston County v. Henry County**, 157 Ala. 246 at page 249.

"In the absence of express provisions to the contrary transferred territory loses all claim to share in the property belonging to the county from which it is taken and is **relieved of the indebtedness resting upon the latter**, except in the cases of debts contracted before the separation and which are a lien upon the detached territory; but it incurs the liabilities and shares of the property of the county to which it is attached and is equally subject to assessment and taxation for that purpose."

Following this decision unless the debts involved were contracted before the separation and were a lien upon the property detached from Lee County, the property so detached is relieved of the indebtedness resting upon Lee County. I find nothing in the three mill tax laws or the warrants issued pursuant thereto making such warrants a lien upon the property or territory detached from Lee County. This three mill tax law appears in the School Code of 1927 in Article XIII, Sections 261 to 293. Section 281 authorizes the County Board of Education to issue school warrants, the due date of which warrants under Section 282 shall not extend beyond the 30th day of September next after the time when the tax for the last year of the levy shall become delinquent. Under Section 283 these warrants are a preferred claim against the proceeds of the three mill tax. Section 284 provides that where the warrants are issued for the benefit of a school dis-

trict that fact must be stated in the resolution authorizing the issue and in the warrant itself. It further provides that the County Board of Education may set apart so much of the district tax income as will be necessary to meet all such warrants maturing during each year. It further provides:

"However, in the event the district tax income is at any time insufficient to promptly and fully pay the district warrants, the County Board of Education shall set apart sufficient funds from the county tax income, which with the district tax income will be sufficient to promptly and fully pay such warrants."

In my opinion, this Section requires the conclusion that such school warrants remain an obligation or indebtedness of Lee County. The territory detached from Lee County and attached to Russell County has already paid to Lee County its just and equitable share of the county indebtedness of Lee County under the Local Act of 1932, Extra Session, page 17. In my opinion the obligation of the school warrants is not a lien upon the territory as referred to in the case above cited.

Therefore, I advise you that the funds now in your hands as the proceeds of the special three mill district school tax for the territory annexed to Russell County are the property of Russell County and should not be paid to the Lee County Custodian of School Funds. It is further my opinion that the payment of \$12,600.00 by Russell County to Lee County in this transfer of territory relieves Russell County of the obligation of paying this district tax to Lee County.

Yours very truly,

A. A. CARMICHAEL,

Attorney General,

June 15, 1937

Hon. W. W. Hill,
Judge of Probate,
Montgomery, Alabama.

Corporation—Code Section 6965 requiring the declaration of incorporation to contain a paragraph that corporation is not concerned with the sale of or traffic in prohibited liquors or beverages not repealed by Alabama Beverage Control Act.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Sub-section (8) of Section 6965 of the Code of Alabama provides that no Probate Judge shall receive a certificate of incorporation for the organization of any mercantile, beverage, transfer company, etc. unless it contains a paragraph that it shall have no right, power or authority to manufacture, sell, keep for sale or otherwise dispose of or store, warehouse, deliver or transport any prohibited liquors or beverages, or to be in any wise concerned in the traffic therein, unless it be a declaration to organize a bona fide drug company etc.

"Will you please advise me: (a) As to whether this section is repealed by the Alabama Beverage Control Act: (b) As to whether or not a corporation expressly formed for the purpose of dealing in beer, wines or whiskey under the Alabama Beverage Control Act is exempted from inserting such clause in its certificates: (c) If the above mentioned section is repealed only in part, please advise me as to the parts which are repealed by the enactment of the Beverage Control Act and which parts are still in effect."

Answering your inquiry I call your attention to that part of Sub-Section (8) of Section 6965; as pertinent which provides as follows:

"*** If the corporation is a mercantile or beverage company, transfer company, traffic company, transportation company, warehouse company, or other like corporation, the declaration of incorporation shall contain a paragraph to the effect that the corporation to be organized shall have no right, power or authority, to manufacture, sell, keep for sale, or otherwise dispose of, or store warehouse, deliver or transport any **prohibited liquors or beverages** or to be in any wise concerned in the traffic therein, unless it be a declaration to organize a bona fide drug company, which must state that it has no right, power or authority to sell or keep for sale, or offer for sale any **prohibited liquor or beverage except** alcohol in the quantity and subject to the restrictions prescribed by the state law, * * * "(Emphasis supplied).

In my opinion the foregoing provision is not repealed by the provisions of the Alabama Beverage Control Act, approved (H. B. 44, Special Session, 1936-37). The effect of said Act is merely to change the legal definition of the terms "prohibited liquors or beverages."

You will note the provisions of the foregoing section required a paragraph in the declaration of incorporation to the effect that the corporation in question will not sell or traffic in, etc., "any prohibited liquors or beverages". The Alabama Beverage Control Act, of course, legalizes certain alcoholic beverages in the so-called "wet" counties but there still are certain "prohibited" beverages, and sub-section (8) of Section 6965 therefore has a distinct field of operation. For instance, Section 51, on page 50 of the pamphlet edition of the Alabama Beverage Control Act provides as follows:

"In all Counties of the State it shall be unlawful for any person, firm or corporation to have in his or its possession any still or apparatus to be used for the manufacture of any alcoholic beverage of any kind, or any **alcoholic beverage of any kind illegally manufactured, or transported, within the State**, or imported into the State from any other place without authority of the Alcoholic Control Board of the State, and any person, firm or corporation violating this provision or who transports any illegally manufactured alcoholic beverages, or who manufactures illegally any alcoholic beverages, upon conviction shall be punished as now provided by law."

You will note that the alcoholic beverages so illegally manufactured or transported would be "prohibited liquors or beverages" within the meaning of Sub-section (8) of Section 6965, supra. It is not undertaken here to enumerate all of the possible applications of said Sub-section (8), but they will occur to you from a reading of the Alcoholic Beverage Control Act.

Premises considered, I therefore advise you that Sub-section (8) of Section 6965 is in no way repealed by the Alabama Beverage Control Act, the only change being in the definition of the term "prohibited liquors or beverages."

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

June 15, 1937

Hon. William O. Baldwin, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Alcoholic Beverage Control Board.—Not authorized to agree to assignment of its vendors' accounts and approve payment thereof to such vendors' assignees.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Numerous vendors of alcoholic beverages from whom the Alabama Alcoholic Beverage Control Board has made its purchases have assigned their accounts to various banks and, in one instance, to a bank as trustee. A typical authorization follows:

"You are hereby authorized and directed to make all payments for _____ sold to your Board by the undersigned _____ to _____, for my account and not directly to me."

"Other assignments are more formal.

"Question 1: May the Alabama Alcoholic Beverage Control Board accept assignments of accounts, covering purchases made in the regular course of the Board's business?

"Question 2: If Question 1 is answered in the affirmative, will you draw up for us a form of assignment that we might properly accept, bearing in mind the fact that the Board has an understanding that 'slow' goods will be exchanged for other merchandise, or repurchased, by the vendor?"

In my opinion, your first inquiry must be answered in the negative.

Such an arrangement made by the creditor and his assignee, as between them, is binding and valid. Bank of Luverne v. Alabama Bank & Trust Company, 217 Ala. 635. And after approval by the debtor of the contract of assignment, he cannot discharge his liability by payment to the assignor, his original creditor. Broadwell v. Imms, 14 Ala. App. 437.

However, contracts binding upon the state can be entered into only by the officers and in the manner provided by law, and the authority and powers of state officers to bind the state by contract cannot be enlarged or varied by custom or usage. County Board of Education v. Slaughter, 230 Ala. 229, and cases there cited.

There appears to be no authority of law for the Alabama Alcoholic Beverage Control Board to bind the state to pay to assignees of its vendors accounts due by it to said vendors on account of alcoholic beverages sold and delivered to the Board.

Of course, the vendors, by properly executed powers of attorney, may authorize any persons, firms or corporations to receive and collect warrants issued in payment of their accounts for such beverages sold to the state.

In view of the answer to your first inquiry, consideration of your "Question 2." is unnecessary.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

June 15, 1937

Hon. Frank N. Julian,
Superintendent of Insurance,
Capitol,
Montgomery, Alabama.

Insurance—Written guarantee furnished by seller of automobile tires construed as warranty of fitness and not contract of insurance.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I have your letter of April 28th, requesting my opinion whether or not warranty and guaranty contracts customarily issued by automobile tire sales companies substantially in the following language:

"The _____ Tire Company guarantees to _____, the purchaser, casing, serial No. _____, size _____, type _____ for the period designated herein on the type of casing stipulated above against road hazards or any condition that may render the tire unfit for further service where such condition is due to reasonable wear and tear or injuries thereto caused by blowouts, cuts, bruises, rim cuts, under inflation, wheels out of alignment or faulty brakes.

* * *

"The liability of the _____ Tire Company, under this guarantee is strictly limited to replacing the unfit tire herein designated with a new tire of the same size and type. If so replaced, purchaser is to be charged and agrees to pay 1/12 of the guaranteed retail list price in the case of all types guaranteed for 12 months for each month, or fraction thereof, which has elapsed since the date of purchase.

* * *

"This warranty does not cover punctures, tires ruined in running flat, fire or theft, clincher tires, or tires used in taxicab or common carrier bus service.

"This warranty does not cover consequential damages," amount to contracts of insurance within the meaning of the applicable statutes.

Section 8341 of the Code defines contracts of insurance as follows:

"8341. **CONTRACT OF INSURANCE DEFINED.**—A contract of insurance is an agreement, expressed or implied, by which one party, for a consideration, promises to pay money, or its equivalent, or to do some act of value to the assured, upon the destruction or injury of something in which the other party has an insurable interest."

Since the tire contracts are issued as a part of and in connection with the sale of the tires at an agreed price, and appear to be used as an inducement to the sale, it would appear that the contracts are based upon adequate consideration. While the language of the above statute is very broad and inclusive, it is not designed to embrace warranties of quality or fitness which usually accompany sales of tangible personal property.

Certain warranties of fitness and quality are as a matter of law implied generally in the sales of tangible personal property. The law further recognizes that specific and detailed express warranties of quality and fitness may be agreed upon by the parties to the sale. **Uniform Sales of Goods Act, Act of 1931, page 573 et. seq.** Common experience abounds in instances of warranties or guaranties by the seller that certain articles shall be of such quality or character as to remain fit for a contemplated use for certain periods of time. Such warranties of fitness are usually in addition to and consistent with warranties against actual and undisclosed defects in material or workmanship.

If it were admittedly impossible to manufacture a tire of such character that it could not be reasonably expected to give the expected service for a given period of time notwithstanding the expected effect of natural wear and tear, blowouts, cuts, bruises, rim cuts or misadjusted wheels or breaks exclusive of injuries from punctures, running flat, fire or theft, it might be reasonably contended that such general warranty contracts contain elements of insurance contracts. I am not prepared to say that, as a matter of law, a tire of such character is not or may not be manufactured.

In view of the elimination from the warranty of certain injuries, caused by hazards agreed not to be directly associated with the character of the article, it is my opinion that the warranty is to be reasonably interpreted as one of fitness for a contemplated use for a given time. As so interpreted, it is my opinion that such a contract does not amount to a contract of insurance.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 15, 1937

Hon. G. S. Byrne,
Tax Collector,
Escambia County,
Brewton, Alabama.

Taxation—Ad valorem taxes—

1. Lands condemned by United States are subject to taxation for given tax year in the event the title thereto passed to the United States after October 1st of such tax year, notwithstanding the fact that proceedings for condemnation thereof were instituted prior to October 1st.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion over the signature of Messrs. Powell, Albritton & Albritton, attorneys, relative to the liability of taxation of certain lands condemned to public use by the United States.

It appears therefrom that on the 23rd day of June, 1936, the United States filed a petition for the condemnation of, to wit, two thousand (2000) acres of land owned by Sessoms Grocery Company in Escambia County, Alabama. The petition was filed under the Clarke-McNary Act of 1924, 43 Statutes at Large 653 and the amendment thereto as set out in United States Code Annotated, Title 16, Section 567.

On the 14th day of September, 1936, an order of condemnation of the property was duly entered by the Federal Court and Commissioners were appointed to appraise and fix the value of the land and the amount of compensation which the owners thereof were entitled for its appropriation. On the 1st day of October, 1936, the Commissioners filed their report and on the 2nd day of October, 1936, the report was confirmed and a Commissioner was appointed to convey all of the right, title, interest and claim of the owners to the United States, when the United States should have complied with the conditions of the decree, viz: the payment of the condemnation award. On January 9, 1937, condemnation award was paid into court.

You inquire if any ad valorem taxes accrued as of October 1, 1936, to be due and payable as of October 1, 1937 upon the lands so condemned.

Your inquiry must be answered in the affirmative.

Taxes upon these lands accrued, i. e., the liability therefor became fixed, on October 1, 1936. **State v. Alabama Educational Foundation**, 231 Ala. 11. On that date title was in Sessoms Grocery Company and not in the United States or any of its agencies. Title vests in the condemnor only upon the payment or the deposit in the registry of the court of the money ascertained by the decree of condemnation to be due as just compensation for the taking. Code of Alabama, 1928, Section 7488; **Choate v. Southern Railway Co.**, 143 Ala. 316.

The case of **Smith v. Jeffcoat**, 196 Ala. 96, cited in the inquiry as authority for the premise that the lands are not taxable, when properly considered and understood militates against the premise.

In that case condemnation proceedings were instituted against owner of the fee for the condemnation of a right of way **After** the proceedings were

begun, the owner leased the lands involved, and the lessee was not made a party to the proceedings. Decree of condemnation was entered. The action was trespass *quare clausum fregit* by the lessee against the condemnor's agent. By special plea, the agent set up that his principal had condemned a right of way across the lands and that the trespass was no more than was necessary to permit the use of the lands for the right of way. Demurrer to the plea took the point that there was no allegation of payment of the compensation awarded before the entry (the trespass complained of). The Court in sustaining the ruling on demurrer, said:

"The theory of plaintiff's case was that, regardless of the institution of condemnation proceedings prior to the time of his lease, he acquired a right of possession superior to that of the condemnor, and that he was not concluded by that proceeding because he was not made a party. The compensation to be paid by the railroad company must be fixed by the valuation of the property as of the date of the petition for condemnation.—*Southern Ry. Co. v. Cowan*, 129 Ala. 577, 29 South. 985, and cases there cited. Assuming that defendant will be able to amend his special plea by showing payment or a deposit of the compensation awarded in court for the owner as provided by section 3882 of the Code, prior to the entry alleged, **the right and title of the railroad company, under whose authority he entered, vested upon such payment or deposit**, and, as against intervening rights, related back to the filing of the petition for condemnation. On the facts stated in the plea, plaintiff acquired his leasehold *pendente lite*, his rights under it were subject to the right of the railroad company petitioning for condemnation, and he was entitled to no compensation as for his alleged interest in the land." (Italics supplied).

In *United States v. Forbes*, 259 Fed. 585, 592, the Secretary of War of the United States, under the power lodged in him by the Congress, had proceeded to condemn certain lands in Montgomery, Alabama. In disposing of the matter the United States District Court for the Middle District of Alabama, said:

"The claim is made by the defendant that the Secretary of War has some agreement with the City of Montgomery to turn this property over to the city upon the happening of some contingency. Answering this claim, it is apparent, from what has been said, that the Secretary of War had the legal right to condemn the fee in this land because in his judgment he had determined that the fee was necessary, and Congress in its wisdom had given him the right, and imposed on him the duty, of making this final determination, and he has performed such duty. The United States government, **when these damages are fixed and paid, will own the fee in the land.**" (Italics supplied).

Inasmuch as the liability of the lands, (and of the owner thereof) for taxes became fixed on October 1, 1936, prior to the time when title passed to the United States or its agency, taxes thereon which accrued October 1, 1936, and became due and payable October 1, 1937, must be collected. Cf. Quarterly Report of the Attorney General, Vol III, page 136.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 15, 1937

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Motor Vehicle Trailers—License—Revenue Act 194, Acts of 1935,
Schedule 158.11.

License fee for trailer and semi-trailer is one-half of license
fee, at time of purchase, for motor vehicle by which it is drawn.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your request which I quote as follows:

"The last Revenue Act specifies that the price of a trailer tag shall
be one-half of the price of the tag on the vehicle which draws the
trailer.

"We have an application for a trailer tag to follow a 1½ ton truck.
The trailer is new but the truck has been in operation since October
of last year and the price of the tag now on the truck was \$23.00. The
price of a tag for the truck if bought now would be less than half
this amount. Please advise us if we should collect one-half the price
of the truck tag for a full year, or should we collect one-half the price
of a truck tag if bought now."

I refer you to Schedule 158.11 which is as follows:

"Schedule 158.11. Every small trailer and semi-trailer shall pay a
license tax of fifty per cent (50%) of the cost of the license tax of
the motor vehicle by which it is drawn. The purchaser shall specify
the truck to which it is to be attached and shall pay one-half (½)
of the amount of that license. Each semi-trailer tag shall bear the
same tag classification corresponding in capacity to the truck tag of
the truck to which it is to be attached. Trailers of any kind or descrip-
tion for hauling passengers for hire are prohibited by law ***."

It is my opinion that the legislature intended that the cost of a tag
for a trailer should be based upon the cost of a license tag for the vehicle
drawing the trailer as of the date of the purchase of the trailer tag and
not as of the date which the tag for the motor vehicle drawing the trailer
was originally purchased. In other words, it was the intention of the
legislature to permit a proportionate reduction in the cost of the trailer
tag as was granted in the cost of the tag for the motor vehicle drawing
the trailer.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 15, 1937

Hon. Chas. E. McCall,
State Auditor,
Capitol.

Where an officer defaults and his bond is not sufficient to take over all the different interests involved in his defalcation, the proceeds of the bond should be properly apportioned.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 4, 1936, in which you request my opinion as follows:

"Where a Circuit Clerk has an official bond in the sum of \$3500.00, and on examination by an Examiner of Accounts it is found that he is due the State \$2000.00, and due to the Sheriff of his County the aggregate sum of \$1000.00, or a total of \$5,000.00 and the surety on the bond wishes to discharge itself from all liability, and wishes to pay to the State of Alabama \$3500.00, to be applied to the obligations of the bond, should the amount of \$3500.00 be ratably distributed among State, County and Sheriff in due proportions to the amounts due on said bond?

"Please refer to 230 Ala. p. 515, State vs. Alabama Power Company, and to the Biennial Report of the Attorney General, 1922-24, p. 174."

I am of the opinion the proceeds of the bond should be apportioned according to the various interests. I call your attention to the case of **State v. Alabama Power Company**, 230 Ala. 513. In fact the provision of the decision we are quoting below was the holding of the Circuit Court and adhered to by the Supreme Court in this case. The part of the decision which I refer to is as follows:

"The trial court ruled that the rights of the parties were governed by the provisions of section 2612 of the Code, which provides: 'Every official bond is obligatory on the principal and sureties thereon—1. For every breach of the condition during the time the officer continues in office, or discharges any of the duties thereof. *** 3. For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by his failure to perform, or the improper or neglectful performance of those duties imposed by law. 4. The words, 'For the use and benefit of every person injured', as used in subdivision three, shall include all persons having a direct and proximate interest in the official act or omission and all persons connected with such official act or omission by estate or interest'; that the liability of the surety is purely statutory, and the statute by necessary implication precludes the application of the common-law doctrine of 'prerogative right of preference' to the fund deposited in court by the surety in discharge of its liability, and the claimants must share ratably in its distribution."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 17, 1937

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Motor Vehicle License—Revenue Act No. 194, p. 256, Schedule 158.16. State Tax Commission required to collect \$1.00 for each motor vehicle tag sold to replace lost, mutilated or destroyed tag.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your communication which is quoted as follows:

"Will you please advise if under Schedule 158.16, this office is correct in charging \$1.00 each for the front and the rear for each replacement tag issued replacing the original lost, stolen or mutilated tag. Section 158.16 reads as follows:

"It shall be unlawful for any person to mutilate or alter for the purpose of deception any motor vehicle tag provided by this Act. It shall also be unlawful for any person to use upon his car any tag in imitation or substitution for real tags lawfully used. It shall be the duty of all sheriffs, police officers, license inspectors and other officers to arrest persons violating these two preceding provisions, and a fine of not less than five dollars (\$5.00) and not more than one hundred dollars (\$100.00) may be imposed for each offense. In case the tags or either of them become mutilated beyond recognition, the owner of the vehicle may file with the State Tax Commission an affidavit setting forth the fact that the tags or one of them has been lost, mutilated or destroyed and upon payment of one dollar (\$1.00) (for each tag) and the surrender of the tag or tags so mutilated or destroyed, new tags shall be issued to the owner by the Commission. In case of mutilated tags the same shall be forwarded with affidavit to the Tax Commission and should lost tag come into his possession it shall be the duty of the person coming into the possession of the tag to immediately forward the old tag to the State Tax Commission. Should he, or any one else use upon any motor vehicle the old replaced tag or tags he shall be fined twice the amount of the license required for motor vehicles upon which the tag is used and shall also be required to procure a license for said motor vehicle. Anyone who makes a false affidavit in obtaining tags from the State Tax Commission shall be guilty of perjury. Justices of the Peace and Inferior Courts with like jurisdiction shall be authorized and shall have jurisdiction for violation of the motor vehicle laws except in the case of felonies."

It is my opinion that Schedule 158.16, supra, requires you to collect \$1.00 for each motor vehicle (single) tag which you sell to replace a lost, mutilated or destroyed tag. You would not be authorized to sell two motor vehicle tags to replace lost, mutilated or destroyed tags for the price of \$1.00, but you are required to collect \$2.00 therefor.

I specifically direct your attention to that portion of the Act quoted in your letter which says: "In case the tag or either of them become mutilated beyond recognition, the owner of the vehicle may file with the State Tax Commission an affidavit setting forth the fact that the tags or one of them has been lost, mutilated or destroyed and upon payment of one dollar (\$1.00) (for each tag) and the surrender of the tag or tags so muti-

lated or destroyed, new tags shall be issued to the owner by the Commission". You will observe that this quoted provision uses both a singular and plural reference to motor vehicle tags and specifically states that \$1.00 shall be charged for each tag. The language employed indicates a clear intention on the part of the Legislature that dual tags should not be construed to mean a single tag and thus permit two tags to be obtained for the price of one.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 17, 1937

Hon. Baynard L. Malone,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Fees—Probate Judge not entitled to a fee for noting the change of ownership of automobile tags on the license record, as there is no law authorizing said fee.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"Under Schedule 158.14 (a) the provision is made for the transfer of a license tag from one owner to the new or successive owner of a motor vehicle.

"Under Section 358 (b) you will find the following provision:

" 'A business or privilege for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the Probate Judge originally issuing such license and the payment of a fifty cent fee.' "

You request my opinion as follows:

Is a Probate Judge entitled to a fee for the transfer of licenses on automobiles upon change of ownership?

In my opinion, your inquiry should be answered in the negative.

There is no provision authorizing the transfer of motor vehicle licenses, as the licenses remain on the vehicle and follow the same and cannot be transferred.

Section 158.14 of the 1935 Revenue Act does not authorize the transfer of a motor vehicle license but only provides for the change of ownership being noted by the Probate Judge on his record of licenses.

I have been unable to find any law authorizing the payment of a fee to the Judge of Probate for noting the change of ownership of automobile tags on the license record.

An officer claiming a fee must point to specific authority giving him such fee.—Quarterly Report of Attorney General, Vol. 1, p. 221, Vol. III, p. 159.

Section 7255 of the 1923 Code of Alabama, provides as follows:

“Section 7255. NO FEE CHARGED UNLESS EXPRESSLY AUTHORIZED.
—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law.”

Section 358 of the 1935 Revenue Act, provides as follows:

“Section 358 (a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license, and shall not be exercised except by the person, firm or corporation licensed, unless specifically authorized by law to do so. (b) A business or privilege for which license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the Probate Judge originally issuing such license and the payment of a fee of fifty cents.”

After considering all of the section, supra, it is my opinion that this section has no bearing on the question involved, as this section is applicable only to the transfer of a license for a business or privilege and not for noting the change of ownership of automobile tags on the license record.

The premises considered, it is my opinion that a Probate Judge is not entitled to a fee for noting the change of ownership of automobile tags on the license record, as there is no law authorizing said fee.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 17, 1937

Hon. P. C. Black,
Judge of Probate Court,
Geneva County,
Geneva, Alabama.

Whenever a deed conveying real property is presented to the Judge of Probate for filing and recording, the filing tax on said deed is based on the real value of the property and not the consideration expressed in the deed.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 8, 1937, in which you request my opinion as follows:

“Please give me your opinion on the following matter:

“A plaintiff recovers a judgment in the Circuit Court, at Law, against a defendant for the sum of \$1200.00. Execution is issued by the Clerk on the judgment and the sheriff levies upon certain real

estate and sells the same, the plaintiff becoming the purchaser thereof at said sale at and for the sum of \$500.00. Prior to the time of the sheriff's sale, the defendant in the judgment conveys said real estate to his wife. This deed from the defendant to his wife is of record in the Probate Office of this County and was of record at and prior to the date of said judgment, and the real estate is assessed to the defendant's wife. The assessed valuation is approximately \$4200.00. The Sheriff's deed purports to convey all the right, title and interest of the defendant in and to said real estate to the plaintiff. The plaintiff filed the sheriff's deed for record, and we charged the plaintiff privilege tax based on a 100% valuation of the property, or \$8.50. The plaintiff has refused to pay the \$8.50 and insists that he should only pay a privilege tax based on the consideration expressed in the sheriff's deed or, if mistaken in that, second that, in no event, should he be required to pay a privilege tax on more than the amount of his judgment. The plaintiff also calls our attention to the fact that the sheriff's deed only conveyed to him the interest of the defendant in and to said real estate and that, should the deed from the defendant to his wife be a valid conveyance, the plaintiff secured no title or interest in and to said real estate by virtue of said deed. Please give me your opinion on the correct amount of privilege tax to be charged under the facts hereinabove set out."

Whenever a party presents a deed to the Judge of Probate to be filed and recorded, the filing tax must be based on the real value of the property at the time execution of the deed. The recited value in the face of the deed is merely prima facie evidence of value, but the Judge of Probate is not bound by this. He may, in fact, it is his duty to go further and inquire as to the real or true value of the property sought to be conveyed. Thompson, Judge of Probate v. Smith, Court of Appeals, Seventh Division, now in manuscript; Quarterly Report of Attorney General, Volume 1, page 66; Biennial Report of the Attorney General, January 1928-30, page 210.

The fact that the deed he presents for filing and recording may or may not be good and that he stands a chance to lose the real estate so conveyed by this deed, could make no difference. If he presents it for recording, he must pay the amount of tax due on same. In other words the Probate Judge cannot be called upon to pass on the title which the deed purports to convey. Likewise the amount of the original judgment for which the land is sold and on which the sheriff's deed is based, makes no difference. The deed as it appears together with the real value of the property conveyed must govern.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 17, 1937

Honorable E. J. Harris,
Tax Assessor,
Lawrence County,
Moulton, Alabama.

Motor Vehicles—Taxation.

1. Automobiles brought into the State of Alabama after last Monday in February and before October 1, 1937, are subject on and after October 1, 1938 to assessment and payment of ad valorem taxes as of October 1, 1937.

2. Used automobiles owned by City of Sheffield on October 1, 1936 and sold to individuals prior to October 1, 1937, subject on and after October 1, 1938 to assessment and payment of ad valorem taxes as of October 1, 1937.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which I quote as follows:

"Please advise me whether or not April the first is the earliest date a person can purchase a new car and be exempt taxes the following assessment.

"Please advise me whether or not there is tax due on used trucks formerly owned by the City of Sheffield and was purchased April the twentieth by a person."

If the automobile mentioned in your letter was brought into the State of Alabama after the last Monday in February and before October 1, 1937, it would be subject to assessment and payment of ad valorem taxes as of October 1, 1937.

The used automobiles which were used by the City of Sheffield on October 1, 1936 and sold to an individual thereafter and prior to October 1, 1937, would be subject to assessment and payment of taxes as of October 1, 1937.

Reference is made to Schedule 158.12 of Act 194, page 256, General Acts of Alabama, 1935, from which I quote as follows:

"To prevent motor vehicles within the meaning of this act, from escaping taxation and to provide for the more efficient assessment and collection of taxes due on same, no license shall be issued to operate the motor vehicle on the public highways of this State nor shall any transfer be made by Probate Judge as provided by this act, until the ad valorem tax on such vehicles shall have been paid in the county for the preceding year, as evidenced by a receipt of the tax collector, where the owner of said vehicle resides, if the vehicle is owned by an individual***.

"Every person, firm or corporation who desires to operate a motor vehicle on the public highways of Alabama, shall first return such motor vehicle for ad valorem taxes to the tax assessor of the county in which he resides, for the preceding year and the tax assessor of this county shall deliver to such person who makes the return as herein required a certificate of assessment on form provided by the State

Tax Commission, and such certificate shall be the warrant of the tax collector to collect the tax as shown thereon.

"(c) *** Motor vehicles brought into this State after the first of October and before the tax assessor has completed his assessment shall be subject to taxation, the same as if it had been held or owned in the State on the first day of October."

Automobile ad valorem taxes are assessable and payable at the same time, but for the preceding year. Opinion of the Attorney General, Quarterly Report Vol 1, page 261. The purchaser of an automobile which was brought into this State after the last Monday in February of 1937, would not have to pay any ad valorem taxes on the car before he purchases his 1939 tag, on or after October 1, 1938, and the taxes assessed and paid at that time would be for the tax year 1937-38—the preceding year.

The purchaser of the automobile from the City of Sheffield, would have to pay no ad valorem taxes until he purchases his automobile tag for the year 1939, which is required to be purchased on and after October 1, 1938 and prior to November 15, 1938. The taxes which the purchaser pays at that time would be for the year 1937-38. There were no ad valorem taxes assessed against the car or due to be assessed for the year 1936-1937 for the reason that the property was owned by the City of Sheffield on October 1, 1936. Sale of the car after October 1, 1936 to an individual did not deprive the car of its exemption status on October 1, 1936. The exemption status continued throughout the tax year. No tax lien attached before October 1, 1937. As I have already stated, the assessment made and the taxes paid on and after October 1, 1938 cover the taxes for which a lien attached October 1, 1937.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 19, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Sheriff or deputy who transfers a person to the insane hospital is entitled to actual expense. No provision for per diem. The sheriff for arresting and placing an insane person in jail is not entitled to a fee for the arrest unless the party is charged with a criminal offense.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 4, 1937, in which you request my opinion as follows:

"When a Sheriff is deputied to remove an insane person to the State Asylum is he entitled to all expenses and a per diem of \$3.00 per day?"

"Unless the judge or jury so orders can a guard be paid expenses and per diem of \$2.00?"

"In his claim against the county for expenses regarding taking, confining and removing an insane person can the Sheriff charge the County an arrest fee or guard fee?"

I find no authority of law for paying anyone deputized by the Judge of Probate their per diem for transporting an insane person to the hospital. The only statute I am able to find is Section 1445, Code of Alabama, 1923, which is as follows:

"Conveying patient to hospital—The Judge of Probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

You will note the above statute says:

"all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury."

The term "all expenses" does not, in my opinion, include per diem.

Answering your second request, I call your attention to an opinion of this office of March 11, 1935, to Hon. Frank O. Deese, Judge of Probate, Dale County, which answers this part of your request fully.

Answering your third request, unless the defendant is charged with the crime, I know of no way the sheriff could be paid an arresting fee. Biennial Report of Attorney General 1926-28, p. 319.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 21, 1937

Hon. C. M. A. Rogers, Senator,
33rd District, Mobile County,
Mobile, Alabama.

Sales tax applies to sales of caskets by resident undertaking company and delivered in Alabama on order of non-resident fraternal organization.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which I quote as follows:

"I would like to get a ruling on the following question which arises under the Alabama Luxury Tax Act. An undertaking company here in Mobile has asked me about this problem and I think it would be very helpful if it could be clarified.

"A fraternal organization which has its home office outside of the State of Alabama makes contracts with this undertaking company for the burial of its members in Mobile and this fraternal organization pays the funeral bill. In almost all cases, the funeral and burial take

place in Mobile or at least within the State of Alabama. This fraternal organization insists that the sale of the casket and other merchandise in connection with such funerals is not subject to the tax imposed by the Alabama Luxury Tax Act on the grounds that it constitutes a transaction in Interstate Commerce.

"Of course, transactions in Interstate Commerce are exempt from this tax (Section 2 (f)). I have made some search of authorities and frankly I cannot see that this is a transaction of Interstate Commerce but I understand that this fraternal organization insists that it has been advised by counsel that such a transaction is not subject to the tax.

"I should certainly appreciate it very much if you would give me your opinion as to whether or not such a transaction is exempt from the tax imposed by the Alabama Luxury Tax Act, either under the provision cited or under any other provision."

It is my opinion that receipts derived from the sales of caskets as mentioned in your letter are subject to the tax imposed by the Alabama Sales Tax Act.

Bearing on the question of interstate and intrastate commerce, I quote from C. J. 12, p. 26, paragraph 25 as follows:

"*** to make a sale of goods interstate commerce, it is necessary that interstate transportation of the goods be involved, the fact that the goods sold are outside the state, or that the seller and the buyer are non-resident, not being sufficient. ***

"A completed contract of sale between residents of a state is not a transaction of interstate commerce, nor is a contract between citizens of different states, when the contract is made and delivery accepted in the state where the property is situated, although the buyer intends to ship the property outside the state."

The Supreme Court of Alabama defines interstate commerce in the following cases: *E. A. Foy & Company v. Haddock*, 191 Ala. 101; *Lee v. Town of LaFayette*, 153 Ala. 675; *Culberson v. American Trust & Banking Company*, 107 Ala. 437.

A sale is completed when title to the merchandise passes to the purchaser, even though the purchase price has not been paid nor delivery of the merchandise made. *McCray v. Young*, 43 Ala. 622; *Rolfe et. al. v. Huntsville Lumber Company*, 62 So. 537, 8 Ala. App. 487; *Southern States Lumber Company v. Long*, 73 So. 148, 15 Fed. 286.

It is my opinion that title to the property or the caskets definitely passes when delivery thereof is made to the customer in Alabama as directed by the fraternal insurance organization. The transaction is completed in Alabama, is intrastate commerce, and therefore subject to the sales tax. *Ex Parte Conecuh Pine Lumber Company*, 180 Fed. Report 249; *Bruner v. Mobile-Gulfport Lumber Company*, 188 Ala. 248, 66 So. 438.

Yours very truly,

A. A. CARMICHAEL,

Attorney General

June 21, 1937

Hon. Claude T. Cotton,
Judge Court of Common Pleas,
Houston County,
Dothan, Alabama.

1. Court of Common Pleas of Dothan, Alabama—Has no jurisdiction of traffic law violations outside Precinct 3, Houston County.

2. Justices of the Peace and the courts of like jurisdiction have final jurisdiction over highway violations.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your inquiry of recent date in which you request my opinion as to whether you have jurisdiction of traffic law violations outside of your beat. I also have your subsequent inquiry as to whether you have jurisdiction of traffic law violation instituted by State traffic police.

1. Your first inquiry should be answered in the negative. The Act establishing the Court of Common Pleas of Dothan, Alabama, (Local Acts, 1923, page 288) provides that said court shall have the same jurisdiction as previously conferred upon the Justices of the Peace in Precinct, 3, Houston County. The territorial jurisdiction of the Justices of the Peace is provided by Section 3846, Code of 1923. Subject to the exceptions there noted, the territorial jurisdiction of the Justices of the Peace is limited to the precinct for which they are appointed. Since your jurisdiction is the same as that of Justices of the Peace, in my opinion, you have no jurisdiction of traffic law violations outside of your beat, except as specifically provided by Section 3846 of the Code of 1923.

2. Your second inquiry is as to whether you have jurisdiction of traffic law violations within your precinct. The Alabama State Highway law provides, Section 104, that upon the arrest of any person, the officer making the arrest can admit him to bail upon the person's giving bond. If the person does not give bond to appear, then the officer is directed to take him immediately "before the nearest or most accessible Magistrate." Section 105 of the Act p. 390 requires Justices of the Peace to keep a full report of every case of violation of the State Highway Act, and sub-section B of Section 105 provides that among the information sent to the State Department by the Justice of the Peace trying the case shall be "all necessary information as to the parties to the case, the nature of the offense, the date of hearing the pleas, the judgment, the amount of the fine or forfeiture, as the case may be," etc.

In my opinion these two sections require the conclusion that Justices of the Peace have final jurisdiction of traffic law violations. The requirement of Section 104, that the person arrested be taken before the nearest or most accessible Magistrate, is not restricted for a mere preliminary hearing. The requirement that Justices of the Peace make reports of the pleas, the judgment, and the amount of fine, is also incompatible with a holding that Justices of the Peace have only preliminary jurisdiction. If the Justice had only preliminary jurisdiction of violations of the Highway Act, he could not assess any fine, and his only power would be to hold the defendant under bond to the Grand Jury or to discharge him.

Construing the entire act therefore, it is my opinion that Justices of the Peace and your court with jurisdiction equal to that of Justices of the Peace, have final jurisdiction of traffic law violations.

Previous opinions of this office to the contrary are hereby expressly overruled, including Biennial Report of the Attorney General, 1926-28, page 445, 446, 696 and 698 and all other published and unpublished opinions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

June 21, 1937

Hon. Gaston Scott,
President, Highway Department,
Montgomery, Alabama.

Vehicle designed to be attached to, and having its front end supported by, a motor truck, but not designed for carrying freight or merchandise is not classified as a semi-trailer in Schedule 158 of the Revenue Act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 16, 1937, in which you request my opinion as follows:

"I am handing you herewith picture of an outfit owned by a citizen of Montgomery. Some question has arisen as to the proper classification and legality of its use on the highways of this state.

"A description of the outfit is as follows: The semi-trailer or house-trailer is seven feet wide, approximately twenty-seven feet long, ten feet high. It weighs approximately 2500 or 3000 pounds. It is designed to be propelled by a truck and a Ford V-8 Truck is used for that purpose.

"Please advise if this outfit should be classified as a semi-trailer, it being designed to be attached to and having its front end supported by a motor truck, but is not designed for the carriage of freight or merchandise. Or should this outfit be classified as a house-trailer, the compartment on said outfit being designed as a living compartment, being equipped with bed rooms, kitchen, toilets etc.

"Under either classification is there any law in this state that would prohibit this outfit being propelled by a truck when said truck complies with all laws governing its use on the highways.

"This outfit is used by its owner for recreational purposes."

In my opinion, said outfit should not be classed as a semi-trailer under the provisions of Revenue Code, Schedule 158. The applicable parts of said Schedule are as follows:

"(1) 'Semi-Trailer': Any vehicle designed to be attached to, and having its front end supported by, a motor truck or truck tractor, and

intended for the carrying of freight or merchandise and with a load capacity of over 1,000 pounds."

You will note that this definition of a semi-trailer applies only to "vehicles intended for the carrying of freight or merchandise". Since such outfit described by you is not intended for the carrying of freight or merchandise it cannot be classified as a semi-trailer. It appears from the facts as set out in your letter that the outfit is properly classified as a house-trailer.

There is no law in this State which would prohibit this outfit being propelled by a truck when said truck complies with all laws governing its use on the highways. The dimensions set out in your letter do not exceed the permissible dimensions under the Highway Code as amended by the Acts of 1932 Extra Session, page 69.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 21, 1937

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Where a party is convicted in the county courts for operating a motor vehicle while intoxicated and his license to drive motor vehicles is cancelled and he appeals his case to the Circuit Court, such cancellation is not operative while said case is pending in the circuit court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 14, 1937, in which you request my opinion as follows:

"Please give me an opinion on the following. When a party is convicted in County Court on the charge of driving an automobile while intoxicated and his driving license is revoked and he takes an appeal to Circuit Court is he permitted to drive an automobile during the time he is awaiting for his case to be tried in Circuit Court. Please give me your reply as soon as convenient.

My answer to your request is in the affirmative. When a person is convicted as stated in your request, and appeals to the Circuit Court, he is here tried without any reference to his former trial in the County Court. In other words, the case in the Circuit Court is tried de novo. This is provided by Section 3843 of the Code of Alabama of 1923, which is as follows:

"3843. Trial of appeal de novo; statement of cause of complaint.—The trial in the circuit court shall be de novo, and without any indictment or presentment by the grand jury; but the solicitor shall make a brief statement of the cause of complaint signed by him."

Boyd vs. State, 132 Ala. 23. Therefore, the order of the county court revoking the license to operate a motor vehicle is suspended pending the outcome of the appeal to the Circuit Court and to make the revocation effective such order would have to be made by the Judge of the Circuit Court on conviction as the case here is tried de novo.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1937

Honorable Charles W. Lee,
State Comptroller,
CAPITOL.

1. Probate Judge—Crenshaw County—Local Acts 179 and 182, Local Acts of Alabama, 1935, pages 104-105 do not authorize County Commissioners to pay to the Probate Judge ex officio fees for discharging his duties in relation to public roads (Section 7285 Code of Alabama) out of the gasoline funds of said County.

2. Probate Judge and his official bond are liable for unlawful payment of ex officio fees for discharging his duties in relation to public roads.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of recent date which I quote as follows:

"Please refer to Local Acts 1935, pp. 104 and 105, Acts No. 179 and No. 182 relative to the payment out of the Gasoline Fund to each member of the Court of County Commissioners for their services supervising and inspecting the roads of said County and mileage traveled by them in performing such services, and the relief of all liability to the State of Alabama and Crenshaw County for the payment out of the Gasoline Fund for such services.

"Do either of said Acts authorize the payment of Ex officio fees of Probate Judge for road services as set out in Section 7285 of the 1923 Code of Alabama, out of the Gasoline Fund?

"If either of said Acts does authorize such payment would the amount paid up to July 8th, 1935, (date the above referred to Acts were approved) be an illegal expenditure of Gasoline Funds?

"If payment of such fees is an illegal expenditure of Gasoline Fund is Probate Judge and his official Bond liable for such expenditure?"

It is my opinion that neither of the Acts set forth in your letter authorize the County Commissioners of Crenshaw County to pay to the Probate Judge his Ex-officio fees for road services as set out in Section 7285 of the 1923 Code of Alabama, out of the Gasoline Funds.

It is my opinion that the payment of such fees out of the Gasoline Fund is an illegal expenditure for which the Probate Judge and his official bond are liable.

The Local Act (No. 179 supra) authorizes each member of the Court of County Commissioners of Crenshaw County to be paid by the County Treasury of Crenshaw County, Alabama, out of the Gasoline Excise Tax Fund for their services in inspecting the work of maintenance, upkeep and repairing of public roads of Crenshaw County, etc. but this Act does not authorize the Commissioners of said County to use any part of said fund to pay the Ex-officio fees of the Probate Judge which he is authorized to receive for performing duties in relation to public road. Section 7285, Code of Alabama, 1923.

Payment to the Probate Judge of his Ex-officio fees for performing duties with reference to the public roads could not be paid from the Gasoline Excise Tax Fund. **Weaver v. Tidwell**, 228 Ala. page 169.

It is further my opinion that such unlawful expenditure is a proper charge against the Probate Judge and his official bond, Section 9575, Code of Alabama 1923. However, the Probate Judge still has a claim against the general fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 21, 1937

Hon. O. L. Andrews,
Clerk of the Circuit Court,
Jefferson County
Birmingham, Alabama

Courts—Order of court taxing costs against both plaintiff and defendant held not apportionment of costs as provided by Section 7221 of the Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 12, 1936, requesting my opinion as follows:

“Please let us have your official opinion as to the issuance of executions by the Clerk in the following case, which order was made by one of the Judges of the Circuit Court.

‘Case dismissed by plaintiff and costs taxes against the plaintiff and also against the defendant.

Thompson, Judge.’

“On a dismissal of this kind we are going to write the following minute entry:

‘On this the——day of—— came the plaintiff by her attorney, and moves the court to dismiss this cause, whereupon,

It is ordered and adjudged by the court that this cause be and the same is hereby dismissed from this court, and it is further

ordered and adjudged by the court that all costs herein accrued be and the same are hereby taxed against the plaintiff and also against the defendant, and that execution for all costs issue against both plaintiff and defendant.'

"This taxation of costs is a little unusual to us and is based on the following rule which has been adopted by our Circuit Judges here in Birmingham;

'18-C. COURT COSTS REGULATED WHERE CASE SETTLED OUT OF COURT OR CASE DISMISSED FOR WANT OF PROSECUTION.

When the parties to any case shall have settled or agreed upon a settlement of any case pending in this court (whether such settlement be tentative or final), in and by the terms of which the defendant, or another for the defendant, has paid or agreed to pay money to the plaintiff in satisfaction of the plaintiff's claim, and thereafter either party (or counsel of either party) shall apply to the court for an order of final disposition of the case (whether by dismissal, nonsuit, judgment for defendant or otherwise), it shall be the duty of the party (or his counsel) applying for the order to inform the court of the fact of such settlement for the purpose of enabling the court to make an advised taxation of costs in the case. When any application of the sort hereinabove referred to, is made to a judge, such judge shall inquire whether there has been an extra judicial settlement of the case, made or agreed upon. If it appears that the parties have made or agreed upon an extra juridicial settlement, the court shall order the court costs taxed jointly against the plaintiff and all defendants that have been served with summons and complaint. When any case is dismissed for want of prosecution, the court shall order all court costs taxed jointly against the plaintiff and all defendants that have been served with summons and complaint, unless good cause for not so doing is shown.'

"With the above facts before you, what we wish to know is:

"1st. Will the Clerk be justified in issuing one execution in which both plaintiff and defendant are named for the costs in the case; or would the Clerk be liable for the issuance of such an execution?

"2nd. If you hold that we can issue against both parties, should an execution be issued against the plaintiff and if that be returned 'No Property Found', then should execution be issued against the defendant; or as stated above, should they both be named in one and the same execution?

"3rd. Would you consider this a valid order on the law or civil side of the Circuit Court?"

Since your first two questions are predicated on the answer to your third question, I have decided to consider your third question first.

In my opinion, your third question should be answered in the negative.

Circuit Court Rule 18-C, quoted in your request, *supra*, was evidently made in pursuance of the provisions of Section 7221 of the Code of 1923, which provides as follows:

"7221. Costs given to successful party, or apportioned at discretion of courts.—The successful party in all civil actions is entitled to full costs for which judgment must be rendered, unless in cases otherwise directed by law, or by the judgment of the court. The court may apportion the costs at his discretion as justice and equity may require; and this provision is applicable in all cases in which the state is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security; but this section shall not apply to justice of the peace courts; but in such courts, the successful party shall recover his costs."

You will note that this Section provides that "the court may **apportion** costs at his discretion as justice and equity may require——". (Italics supplied)

In my judgment, the question of whether or not the court order quoted in your request, *supra*, is a valid order must depend upon the question of whether or not there is an apportionment of costs in accordance with Section 7221, *supra*. The word "apportion" or "apportionment" as refers to costs has been defined in Words & Phrases, 2nd Series, Vol. 1, page 254, as follows:

"Where plaintiffs in ejectment recovered a part of the land sued for, a judgment assessing all of the costs against plaintiffs was not an 'apportionment' within the rule that, where plaintiff recovers only part of the land sued for, the court may apportion the costs. **Daniels v. Smith**, 96 N. E. 902-904."

The word "apportion" is further defined in Words & Phrases, 1st Series, Vol. 1, page 462, as follows:

"The word 'apportion' means to divide, to assign in just proportion, to distribute among two or more, a just part or share to each. **Fisher v. Charter Oak Life Insurance Co.** (N. Y.) 14 Abb. N. C. 32, 36."

"Apportion means simply to divide and does not necessarily mean to divide equally. **Jones v. Holzapfel**, 68 Pac. 511, 515". *Ibid*.

To apportion the costs, in my judgment, the court must necessarily make division or allotment of the costs. The legislative intent back of this statute would seem to be that the court should assess each party to the suit or only one party with a part of the costs. The taxing of each party to the suit with all of the costs is clearly not an apportionment of costs.

It is evident that the purpose back of this rule is the collection of the costs in the case in any event, but such purpose, namely, making sure that the county does not lose any costs in a case by taxing both the plaintiff and the defendant with all of the costs, in my judgment, is entirely foreign to the legislative intent found in the statute itself.

In my opinion, therefore, the court order referred to above is not a valid order.

The necessity of answering your questions one and two is eliminated by the answer to your question numbered three.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 23, 1937

Hon. Chas. W. Lee,
State Comptroller
CAPITOL.

Taxation—Act No. 300, General Acts, 1931, page 337, not repealed

Act No. 300, General Acts of 1931, p. 337, (which provides procedure to be employed by County Tax Assessor and Collector in assessing and collecting ad valorem taxes for cities within a population range of 6,500 to 15,000 inclusive) not repealed by Act No. 194, Section 201, (formerly 3095 of Code of 1923) General Acts of Alabama, 1935, p. 256, (which also provides procedure to be employed by County Tax Assessor and Collector in assessing and collecting municipal taxes in all other cities and towns when invoked by city ordinance.).

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date as follows:

"The cities of Huntsville, Fairfield, Tarrant City, Troy, Talladega, Phenix City and Florence are operating under Act No. 300 of the General Acts of the Legislature of 1931 (pages 337-344) which provides complete machinery for assessment and collection of ad valorem taxes for the cities in the population class of 6,500 to 15,000 both inclusive.

"The question arises as to the effect of the General Revenue Act of 1935 (General Acts of the Legislature of 1935, pages 256-574) on the forementioned Act (Act No. 300 of the General Acts of the Legislature of 1931).

"Does the General Revenue Act, above referred to, repeal the Act of 1931 (Act No. 33, General Acts of 1931)?"

It is my opinion that your question should be answered in the negative. Section 3095 of the Code of Alabama, 1923, is an **optional** law with **administrative** provisions for the assessment and collection of municipal ad valorem taxes. This section was reenacted by the Legislature in 1935 and appears as Section 201, Act 194, General Acts of 1935, page 348. Prior to June 26, 1931, section 3095 had application to every municipality in the State of Alabama. On June 26, 1931, the Governor gave official approval to Act No. 300, General Acts of 1931, pages 537-544, which withdrew from the operation of Section 3095, supra, all municipalities within a population range of 6,500 to 15,000 inclusive. Act 300, supra, contains **mandatory** administrative provisions for the assessment and collection of ad valorem taxes for those cities within specified population range. It contains no option on the part of those cities within the specified population range to avail themselves of the administrative features. There are some distinctions between the administrative provisions of the two laws.

Contained in Act No. 194, (Acts of 1935) supra, (General Revenue Act of Alabama) is Section 411 (p. 574) as follows:

"That all laws or parts of laws in conflict with the provisions of this Act are hereby repealed, provided that all provisions of existing laws relating to taxation and revenue which are not in conflict with

the provisions of this Act and which are not herein expressly repealed, are not hereby repealed."

The Supreme Court of Alabama, in the case of Board of Revenue, et. al. v. Johnson, 200 Ala. 532, 76 So. 859, reaffirmed the principle of law enunciated in the case of Allgood v. Sloss-Sheffield Steel & Iron Company, 196 Ala. 500, 71 So. 724, that "when existing statutes are re-enacted the effect is merely to continue them in force in their original sense." Since June 26, 1931 and prior to the enactment of Act 194, (Section 201) cities within a population range of 6,500 to 15,000 inclusive had been excluded from the operation of Section 3095 (Now Section 201 of Act 194, supra.) If the re-enactment of Section 3095, Code of Alabama, 1923, appearing as Section 201 (Revenue Act), continues in force the original law, then Section 3095, limited in application, as it was, by the adoption of Act 300 in 1931, was reenacted, and not the broad act which existed prior to the adoption of Act 300 in 1931. The re-enactment of Section 3095, Code of Alabama, did not function to reclaim those cities within the population range of 6,500 to 15,000. The effect of the enactment of Act 300, (Acts of 1931) supra, was to repeal the provisions of Section 3095, Code of Alabama, in their application to cities within the population range set forth in the act and to put them in a separate class. The re-enactment of Section 3095, supra, did not modify, change, or alter this repeal, but merely continued in operation said section divorced of application to those cities within the aforestated population range. American Standard Life Insurance Company v. State, 147 So. 168, 226 Ala. 3837:

"The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed not as an implied repeal of the original statute, but as (an affirmative and) a continuation thereof" Tucker v. McLendon, 210 Ala. 562, 98 So. 797, 799."

In the foregoing case of Board of Revenue v. Johnson, the court had under consideration an act of the legislature approved on September 16, 1915, (Senate bill 744) which relieved all persons from road duty who resided in counties where the aggregate tax values, according to the valuation of the preceding year, were one hundred million dollars or more. This exemption at the time applied only to Jefferson County.

By an Act approved September 22, 1915, the legislature re-enacted Sections 5777 and 5778 of the Code of 1907, imposing a duty on all persons to work the road and granting exemptions therefrom to all women, and to all males under the age of 18 and over the age of 45. This act also contained a provision "that this act shall not be construed to repeal either in part or in whole any existing special or local law."

The Board of Revenue took the position that the act which re-enacted sections 5777 and 5778 of the Code of 1907, repealed the act approved September 15, 1915, (Senate Bill 744, supra.) The appellee brought appropriate action to restrain the Board of Revenue from enforcing the act, approved September 22, 1915, supra. It was conceded that if the act approved September 15, 1915, was not repealed, the bill had equity.

Justice Somerville, speaking for the Court said as follows:

"While Senate Bill 744 is in legal theory a general law, it is in fact so far as its operation is concerned, a special law, since it singles out and withdraws from the influence of the general law a certain class of counties, by a distinction which is applicable at present only to Jefferson County. It does not deal with the matter of personal exemptions from road duty, but exempts certain counties from the operation of the general road law. It has a distinct purpose which is en-

tirely consistent with the existence of a general law applicable to all the counties whose more limited tax revenues may require the personal aid of their citizens in the maintenance of public roads; and it was intended to coexist with the general law.

"But if Senate Bill 744 be treated technically as a general law, yet it cannot be held to be repealed by House Bill 1449, 'if it is possible to reconcile the two statutes so as to permit both to stand, without violating the sound principles of construction.' It is a settled rule of construction that when existing statutes are re-enacted the effect is merely to continue them in force in their original sense. ***

"So the re-enactment of Sections 5777 and 5778 of the Code *** cannot be intended as working a repeal of another statute with which they were designedly coexistent before, but clearly imports a continuance of that coexistence and co-operation."

The enactment of Act 300, supra, exempted certain cities from the optional operation of Section 3095, Code of 1923, just as did Senate Bill 744, supra, exempt certain counties from the operation of the Act imposing road duty on certain persons. The legislature might have felt that this group of cities needed a law which would be free from doubt as to whether or not the county tax officials were under mandate to assess and collect the taxes. At that time, no court opinion had been rendered construing the legal effect of Section 3095, and there was some uncertainty as to whether Section 3095, Code of 1923, imposed an official duty upon the tax officials. The legislature incorporated in the Act of 1931 more detailed and specific administrative rules for the assessment and collection of the municipal tax, which was authorized to be imposed by the terms of the act. The objectives of Section 3095 and of the Act 300, supra, were the same, namely, the collection of city tax. The two laws merely provided different routes to reach the same objective; they were co-existent and cooperative. As stated in the opinion of Justice Somerville, supra, the re-enactment of Section 3095, Code of 1923, "clearly imports a continuance of that co-existence and cooperation." Both have distinct, but not conflicting, fields of service and both have a common purpose, although different administrative rules in the performance of that common purpose.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 23, 1937

Hon. William O. Baldwin,
Chairman, Alabama Alcoholic
Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Malt or brewed beverages may not be served by licensed retailers to persons seated in automobiles parked upon the licensed premises or parked in street or roadway adjacent thereto, since same must be served to persons seated at tables.

Opinion by the Attorney General.

Dear Sir:

I have your request for opinion as follows:

"1. Is it permissible to serve beer to people in a car on licensed premises?

"To further clarify the matter, please answer:

"2. Is it permissible to serve beer to people in car on city streets or public roadways?"

Both of your inquiries must be answered in the negative.

The provisions of the Alabama Beverage Control Act pertinent to your inquiry are very clear.

A retailer of malt or brewed beverages is defined in Section 2, sub-section (r) as follows:

"(r) 'Retailer' means and includes persons licensed by the Board to engage in the retail sale of malt or brewed beverages of an alcoholic content not in excess of four (4%) per cent by weight and five (5%) per cent by volume to be consumed on the premises or to be carried or delivered to the address of the purchaser."

Section 23, sub-section (c) provides in pertinent part:

"(c) Sales by Retailers. No retailer shall purchase or receive any malt or brewed beverages except from regular licensed wholesalers or distributors duly licensed under this Act. And all such malt or brewed beverages must be received in original containers as prepared for the market by the manufacturer. The retail dispenser may thereafter break the bulk upon the licensed premises and sell or dispense the same for consumption on or off the premises so licensed.

* * * *

"No retailer shall sell any malt or brewed beverages for consumption on the licensed premises except in a room or rooms placed on the licensed premises at all times accessible to the use and accomodation of the general public; but this section shall not be interpreted to prohibit a hotel or club licensee from selling malt or brewed beverages in any room of such hotel or club house occupied by a bona fide registered guest or member entitled to purchase the same."

Section 28 provides in part as follows:

"Section 28. There shall be no electric signs, painted signs, etc., displayed outside any place of business advertising alcoholic beverages as enumerated and defined. Malt or brewed beverages must be sold in sealed containers such as bottles or cans, each bottle or can containing not to exceed one pint or sixteen ounces.

"All such beverages must be sold and/or served to consumers or persons **seated at tables**. *** It is the intent and purpose of this Act that no so-called open saloon be operated within this State." (Emphasis ours)

In view of the plain, clear and unambiguous wording of the above quoted provisions of the Act, and especially in view of the provisions contained in Section 28, that all such beverages must be sold and/or served to consumers or persons seated at tables, it seems very clear that beer may not be served

to people seated in automobiles parked upon the licensed premises or parked in the street or roadway adjacent thereto, and I so advise you.

Per contra, all malt or brewed beverages sold by licensed retailers for consumption on the premises must be served to persons seated at tables in accordance with the provisions of Section 28, supra.

Of course, this does not mean that licensed retailers cannot sell malt or brewed beverages to be carried or delivered to the address of the purchaser. Sub-section (r), supra, gives them express authority to make such sales. The holding above announced only applies to sales of malt or brewed beverages by licensed retailers for consumption on the premises, and does not apply to sales of malt or brewed beverages by them to be carried or delivered to the address of the purchaser and not consumed on the premises.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

June 24, 1937

Hon. Thomas J. Arledge,
Road Supervisor,
Chilton County,
Clanton, Alabama.

Counties—Under Local Act No. 3, H. No. 3, approved March 10, 1936, Road Supervisor of Chilton County has authority to hire and fire district road foreman and the Commissioners Court of Chilton County does not have the authority to fire or cause the removal of said road foreman.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of June 2, 1937, in which you state:

"Under Act No. 3, H. 3, approved March 10, 1936, (Local Acts 1936, p. 4), I was appointed road supervisor of Chilton County, Alabama, duly qualified and commissioned. Section 5 of said Act provides in part as follows:

" 'Section 5. That the duty and authority as to the building, maintenance or repairing of public roads and bridges in Chilton County, Alabama, be and the same is hereby vested in said Road Supervisor, subject only to the control of said Commissioners Court of Chilton County, Alabama, as herein set forth. And to that end said Road Supervisor is given the duty, power and authority to employ or hire teams, machines, trucks and all necessary employees, laborers or helpers to properly construct, maintain and repair the roads and bridges of said County.'

"Under the authority given me by this Act, I appointed three district road foreman who have been serving under me for the past eleven months. On April 29, 1937, the Commissioners Court of Chilton County passed a resolution dismissing my three district road foremen. A copy of said resolution is attached hereto, and reads as follows:

" It appearing to the court that the County is not deriving benefit from the services from the Four District Foremans or District Supervisors in proportion to their salary, and also that there is a duplication in their services. It was moved by Commissioner Bean and Seconded by Commissioner Oden that the services of said Four District Foremans or District Supervisors be discontinued, beginning May 1st, 1937, and further that the County Supervisor and said District Foremen be notified of this and said Motion being put to the Court the same was adopted."

"I am continuing my three district road foremen in the employ of the county and am personally guaranteeing their wages."

You request my opinion:

"I wish your advice as to whether I have authority to hire and fire the district road foremen under the Act, supra, or whether the Commissioners Court has the right to fire or cause the removal of the district road foremen."

Answering your question, it is my opinion that under Act No. 3, H. No. 3, approved March 10, 1936, (Local Acts 1936, p. 4), you as the Road Supervisor of Chilton County, have the sole authority to hire and fire the district road foremen and the Court of County Commissioners of Chilton County does not have authority to fire or cause the removal of said road foremen.

Section 5 of said Act No. 3, H. No. 3, approved March 10, 1936, (Local Acts 1936, p. 4) provides in part as follows:

"Section 5. That the duty and authority as to the building, maintenance or repairing of public roads and bridges in Chilton County, Alabama, be and the same is hereby vested in said Road Supervisor, subject only to the control of said Commissioners Court of Chilton County, Alabama, as herein set forth. And to that end said Road Supervisor is given the duty, power and authority to employ or hire teams, machines, trucks and all necessary employees, laborers or helpers to properly construct, maintain and repair the roads and bridges of said County. ****"

Section 8 of the Act is as follows:

"Section 8. That the authority of said Road Supervisor shall be limited to the expenditure of such funds for the purpose of construction, maintenance or repairs of the public highways and bridges of Chilton County as may be set aside and appropriated by the Commissioners Court of Chilton County, Alabama, as hereinafter provided. That within one month preceding the first Monday in February, May and August and November the Commissioners Court of Chilton County, Alabama, shall by order or resolution spread upon the minutes of said Court fix and determine the amount of funds which will be available for the purpose of building, maintaining and constructing the public roads of Chilton County, for the following three months period, and which amount, other than the salary of the said Road Supervisor and his necessary expenses shall not be exceeded by him in constructing, maintaining or repairing the public roads in Chilton County during said period, provided, however, that said Commissioners Court is authorized from time to time within any such period to increase the amount so allowed to be expended by said Road Supervisor during any such period."

I am of the opinion that the road foreman may be discharged only by the Road Supervisor of Chilton County. Under the Local Act the authority to employ is vested in the Road Supervisor, and the authority to employ carries with it the authority to discharge.

See opinion of Attorney General to Hon. Saxon P. Poyner, Judge of Probate, Houston County, under date of April 28, 1937, a copy of which is enclosed for your convenience.

In the case of *Touart v. State ex rel. Callaghan*, 173 Ala. p. 453, the Court of Alabama said:

"If the appointing power is given the right to fix the term during which the appointee is to hold office, then, of course, the right of appointee terminates at the end of the will of the appointing power; that is, the appointing power can remove him at pleasure, unless the act or statute authorizing his appointment provides otherwise."

After a careful study of the Local Act, it is my opinion that "Subject only to the control of said Commissioners Court of Chilton County, as herein set forth," means that the court may limit the expenditures of the Road Supervisor by not appropriating the necessary funds, but that the Commissioners Court cannot hire or discharge any of his employees.

In the case of *State ex rel. McIntyre v. McEachern*, 166 So. 36, the Supreme Court of Alabama, in construing a similar local statute said:

"Nothing will be presumed in favor of the jurisdiction of a court with special and limited powers. When general or unlimited jurisdiction is not specially conferred on the court of county commissioners, its powers are special and limited by the grant, and its proceedings must show on their face that it acted within the limits and terms of the grant."

The premises considered, it is therefore my opinion that under the Local Act the Road Supervisor of Chilton County is the only one who has authority to hire and fire the district road foremen, and the Commissioners Court does not have the authority to fire or cause the removal of said district road foremen.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

June 26, 1937

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Taxation—H. B. No. 259, General Acts, 1936-37 Special Session, approved February 3, 1937, construed.

1. Real estate sold for ad valorem taxes and bought in by the State at any time prior to January 1, 1935, may be redeemed by any lawfully authorized person in four equal annual installments without interest or penalty, provided the State has not parted with its title as provided by law.

2. (a) Application for redemption shall be filed with the Probate Judge of the County where the land sought to be redeemed is situated, and must be approved by the State Land Commissioner.

2. (b) Applicant who seeks to redeem should file one application addressed to the Probate Judge who shall forward the same to the State Land Commissioner for approval.

3. Act No. 49, General Acts, 1936, page 27, amending Section 291, of the Revenue Act of Alabama, 1935, expired December 31, 1936.

4. The Act of February 3, 1937, *supra*, authorizes redemptions by payment of any amount in multiples of one fourth of redemption charges originally due.

5. (a) Title to the land which is redeemed passes to redeemer on payment of first installment subject to lien of State for subsequent installments.

5. (b) Redeemed property should be assessed during installment period and subsequent years,

6. Section 294, (General Acts, 1935, page 378) offers alternative plan of redemption.

7. Section 277, (General Acts, 1935, page 372) has application to redemptions perfected under H. B. 259, *supra*.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of February 23, 1937, which I quote as follows:

"Please give me your opinion on the meaning of, effect of, and procedure to be followed in carrying out the provisions of House Bill 259, approved February 3, 1937.

"I have compared House Bill 259 with the Act of March 26, 1936, (G. A. 1936, page 27) and have noted several points on which these two Statutes appear to vary. Attached is a comparison of the two above mentioned Statutes, marked by underlining, to show changes.

"Please give me an answer to the following questions so that I may be in position to handle correctly redemptions under House Bill 259.

Ques. 1 The Act approved March 26, 1936 contained the following words: "All persons having the right to redeem, shall have four years from date of sale to redeem . . ." The Act approved February 3, 1937, apparently does not contain this provision. Does this mean that all lands bought in by the State prior to January 1, 1935, and still in possession of the State, can be redeemed in quarterly payments without interest and penalties?

Ques. 2 The Act of March 26, 1936, contained the following words: ". . . the same to be approved by the State Land Commission, . . ."; whereas the Act approved February 3, 1937, contained the following words: ". . . shall, . . . make application to the State Land Commissioner and to the Probate Judge . . ."

Ques. 2 (A) Do you interpret this provision to mean that applications under the Act of February 3, 1937, shall be filed with the Probate Judge and subsequently approved by the State Land Commissioner as heretofore?

Ques. 2 (B) Shall an applicant make one application addressed to both the State Land Commissioner and the Probate Judge and shall the Probate Judge upon receiving such application forward same to the State Land Commissioner as heretofore, or shall some separate and distinct procedure be followed?

Ques. 3 Did the Act of March 26, 1936, expire December 31, 1936, or was it repealed by the Act of February 3, 1937, or is any part thereof still in effect?

Ques. 4. Is the February 3, 1937, Act mandatory as to the payment of **one-fourth of said sum annually**, or may a person redeeming pay in any multiple of one-fourth oftener than annually if he desires to do so?

Ques. 5 (A) Does the title to land being redeemed pass to the person redeeming upon payment of the first installment?

Ques 5 (B) If the title passes out of the State, subject to a lien for the unpaid installments, shall the person assess for taxes for the subsequent years, particularly those years during which installments on the redemption are being paid?

Ques. 5 (C) If the title does not pass out of the State to the person redeeming are there any taxes accruing subsequent to the first installment on redemption and prior to the final installment on redemption?

Ques. 6. How is Section 294 (G. A. 1935, page 378) construed in reference to the Act of February 3, 1937?

Ques. 7 How is Section 277 (G. A. 1935, page 372) construed in reference to the Act of February 3, 1937?

Question No. 1 in your letter should be answered in the affirmative. The Legislature of Alabama incorporated in the Revenue Act of 1935 Section 291 which was amended by Act No. 49, General Acts 1936, page 27. This Act in its original form and as amended offered a plan of redemption for land sold to the State of Alabama prior to January 1, 1935, provided such sale took place within four years prior to the date of redemption. It is quite apparent after reading Section 291 as amended and H. B. 259, approved February 3, 1937, which is the subject of this opinion that the Legislature intended by the last named Act to extend the period in which applications may be filed through January 1, 1938. As hereinafter stated in this opinion, Section 291 supra, as amended, expired on December 31, 1936, but H. B. 259 offers the same plan of redemption for another year, but leaves out all limitations of time from the date of the tax sale to the date of redemption. The absence of such provisions clearly indicates that it was the intention of the Legislature under H. B. 259, supra, to permit redemption under the terms of the Act, of any real estate sold at any time prior to January 1, 1935, and that it was not the intention to limit or to circumscribe the redemption to land sold to the State within four years of the redemption. I therefore hold that real estate sold for ad valorem taxes and bought in by the State of Alabama at any time prior to January 1, 1935, may be redeemed by any lawfully authorized person, in four equal annual

installments, without interest or penalty, provided, however, that the State of Alabama has not parted with its title in the manner provided by law.

Answering question 2 (a), it is my opinion that the application for redemption should first be filed with the Probate Judge of the County, where the land sought to be redeemed is situated, and thereafter, the State Land Commissioner may approve the same. The Act provides that any person having the right to redeem and who desires to redeem from the State, shall make application to the State Land Commissioner and to the Probate Judge of the County where the real estate is situated. If the procedure outlined in this and the next paragraph is followed, I think the requirement of the Act that application shall be made to the State Land Commissioner and the Probate Judge will be fully met.

With reference to Question 2 (b), it is my opinion that the Act requires the applicant to file only one application addressed to the Probate Judge, whose duty it is upon receipt of such application to forward the same to the State Land Commissioner for his approval.

Question 3. It is my opinion that Act No. 49, General Acts, 1936, page 27, amending Section 291, Revenue Acts of Alabama, 1935, expired December 31, 1936. The wording of the Act indicates that it was the intention of the Legislature that the authority granted in said Act should not extend beyond December 31, 1936.

Question 4 of your letter presents a matter upon which an opinion of this office has already been rendered. Quarterly Report, Attorney General, Vol. 1, page 207. This opinion refers to the provisions of Section 291, Revenue Acts of Alabama, 1935, and amended by Act 49, General Acts, 1936, page 27. There is such a striking similarity and identity between the provisions of Section 291, *supra*, and H. B. No. 259, *supra*, as to the time and manner in which the installments may be paid, that I feel no hesitancy in adopting as a part of this opinion a portion of the opinion as follows:

"Does this permission to pay without interest apply to parties who desire to redeem in cash and not avail themselves of the four years partial payment plan? The unreason of charging a person interest who pays cash and not requiring interest of a person who takes four years to pay argues more strongly that it does. On the other hand, it has been pointed out that the statute provides that the party redeeming shall deposit one-fourth of the amount required and 'annually thereafter shall pay, etc.'. This has been argued to be a mandatory requirement that such payment shall be annual and that in order to be exempted from the payment of interest the partial payment plan with payments on an annual basis must be strictly followed.

"I am not convinced that so strict a limitation can be placed on the language. In the first place, language is 'may pay.' This is clearly permissive. The parties 'shall have four years'. This is an outside limitation. I think, not a specific command that such parties must take four years whether they so desire or not. The words 'annually thereafter' do not convey to my mind an absolute requirement that the payments must be annual and can be made in no other way. Coupled with Section 292, it appears to me that unless a party makes the quarterly payments at least annually, he will be in default. I do not think the Legislature intended to say to a redemptioner: 'If once you elect to follow the partial payment plan, you cannot pay up all the installments and release the property entirely except by making a payment of twenty-five per cent (25%) annually.' Such a conclusion is opposed to sound logic as well as the purpose sought."

"It is therefore, my conclusion that as to property sold to the State for taxes prior to January 1, 1935, *** redemption is authorized by Section 291 without the payment of interest and this is true whether such redemption be for cash or on the partial payment plan. I think further that should a person paying the first installment desire to complete his payments in less time than allowed, he has that right, though such payment must be in multiples of one-fourth of the total amount originally due."

I, therefore, conclude that the Act of February 3, 1937, authorizes redemption payments of any amount in multiples of one-fourth of the redemption charges originally due. Such anticipation may be made without the payment of any interest or penalties that are waived when redemption is effected through one-fourth annual installments.

Referring to Question 5 (a), it is my opinion that the title to the land being redeemed passes to the redemptioner on payment of an amount equal to not less than the first installment. This title passes subject to a lien of the State for subsequent installments. If you will refer to an opinion of this office to Hon. Roy Johnson, Tax Assessor, Birmingham, Alabama, reported in Volume II, Quarterly Report of the Attorney General, page 205, you will find that in construing Section 291 of the Revenue Act of 1935, which Section contains words of similar import to those under consideration at the present time, I held that "Where party redeems from tax sale to the State under installment plan authorized by Section 291 of the 1935 Revenue Act, he should assess and pay the taxes for all years subsequent to such redemption." I further held, after quoting Section 292 of the Revenue Act of 1935, as follows: "It is to be noted that the State shall have a 'lien' for unpaid installments. This would indicate that there is a conveyance to the redemptioner with a lien similar to a vendor's lien reserved, and not merely an option to purchase or redeem on payment of the balance due." I further quote as follows: "This is further emphasized by the specific manner in which foreclosure is provided for and the ultimate sale to the State. There is even a provision for a deed to the State upon such foreclosure." Again, I quote from that opinion: "The conclusion that I reach from both the sections read together is that upon making the installment payment required, the lands pass back to the redemptioner and hence it is his duty to annually assess and pay the taxes thereon for the years subsequent to such redemption. He must, of course, also make the balance of the installment payments to avoid foreclosure as provided by Section 292."

Act No. 49, which is under consideration in this opinion, reads in part as follows: "Whenever any real estate has prior to January 1st, 1935, been sold for taxes and bid in by the State at tax sale, the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, except that the following additional provisions shall apply: 'All persons having the right to redeem, such redemption shall be made as in other cases, except that the parties desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties.'"

Your attention is called to the following expressions used in the preceding quotation: "The same may be redeemed in the same manner," "All persons having the right to redeem," "Such redemptions shall be made as in other cases, except that the parties desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties."

The following quotations from the opinion of February 26, 1936, to Hon. Roy Johnson, Vol. 1, page 207, are pertinent.

"Without more, the foregoing would very clearly indicate that so far as passing the title from the State to the redemptioner, the same legal effect is intended by the installment payment as if the redemption money had been paid in full."

I now wish to direct your attention to Section 292, Revenue Act of 1935, page 378, which reads as follows:

"Section 292. The State of Alabama shall have a lien for all unpaid partial payments as well as for taxes for any subsequent year, and in case of the failure to pay any one of said installments together with the taxes for any subsequent year, either or both, the State Land Commissioner for and in the name of the State of Alabama, shall at his option declare all said installments due and payable at once. In case of default in payment of any installment or of any subsequent taxes, the State Land Commissioner in the name of the State shall have a right to file a bill in equity to foreclose the lien of the State, and in such suit all parties at interest shall be made parties defendant. Such suit shall be filed in the County where the land or the major portion thereof is situated. The court shall determine what amount, if any, of such taxes or installments are illegal, and in its final decree shall determine the total amount due on such installment payments, and any unpaid subsequent taxes, and shall render judgment therefor which shall include costs and shall order the property sold to satisfy the decree in the same manner as in the foreclosure of mortgages on real estate in the Court of Equity. If at such sale no one bids a sufficient sum to pay the full amount of the decree, the officer conducting the sale shall announce that the real estate is sold to the State of Alabama for the amount of the decree, interest and costs, and the sale shall be reported to the Court and be confirmed and a deed made to the State of Alabama, and the State shall be entitled to a writ of possession. The purchaser at such sale, including the State shall be entitled to a deed, and the same processes and remedies to obtain possession of the premises as in other suits where land is sold under order of a court of equity, and the title to the land conveyed by such deed shall be indefeasible as to all parties defendant in the action."

If it was not the intention of the Legislature that the redemptioner, upon payment of the first installment or of an amount of not less than the first installment, should acquire title to the property redeemed subject to the lien of the State, then Section 292, supra, would not have a field of operation. This Section prescribes the procedure that the State of Alabama shall take to recover the land upon which there is a debt due the State for installment taxes. Such procedure in my judgment assumes that the redemptioner has acquired title to the property, and I do not doubt it was the intention of the Legislature that title to the property passed to the redemptioner upon payment of the first installment or a sum equal thereto.

I refer to your Question 5 (b). If the redemptioner acquired title to the property, as I have already held in the foregoing paragraph that he has, it is his duty to assess the property during subsequent years and to pay taxes thereon.

Responding to Question No. 6 in your letter, it is my opinion that Section 294 (General Acts, 1935, page 378) offers an alternative plan of redemption. The Probate Judge therefore could permit redemptions without regard to the provisions of House Bill 259, supra.

Question No. 7 in your letter. It is my opinion that Section 277 (General Acts 1935, page 372) also has application to redemption perfected under H. B. 259, *supra*. The Probate Judge, in my opinion, after the first installment is paid, should observe the mandates contained in that Section. The tax assessor should also comply with the provisions thereof.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

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